

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Case No. 1:12cr238
Akron, Ohio
Plaintiff, Tuesday, August 7, 2012

vs.

BRANDON BAXTER,
Defendant.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID D. DOWD
UNITED STATES DISTRICT JUDGE

MOTION TO SUPPRESS

APPEARANCES:

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Court Reporter: Lori Ann Callahan, RMR-CRR
United States District Courthouse
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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 P R O C E E D I N G S

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4 THE COURT: The court calls the case of United
10:00:27 5 States of America versus Brandon Baxter, Case Number
6 12:cr238.

7 Counsel for the defendant, Brandon Baxter, has
8 filed a motion to suppress his post-arrest statements, or in
9 the alternative, to exclude the statement based on recording
10:00:53 10 defects.

11 Let the record show that counsel are present,
12 as well as Mr. Baxter.

13 In the memorandum, the statement is made that
14 Mr. Baxter's statements should be suppressed because under
10:01:16 15 federal constitutional standards, the statements were given
16 involuntarily, because the Miranda warnings were misleading
17 and because the warning failed to advise Mr. Baxter of the
18 essential components of the Fifth Amendment privilege.

19 In the alternative, counsel urges the court to
10:01:39 20 exclude the statement based on technical defects in the
21 recording of the statement.

22 Mr. Pyle, are you prepared to go forward in
23 support of your motion?

24 There's also a question of who goes first.
10:02:08 25 Have counsel discussed the question of order here?

1 MR. HERDMAN: We haven't, Your Honor. The
2 government is prepared to call its witness to the extent
3 that the court would entertain that, just start hearing the
4 evidence.

10:02:21 5 THE COURT: Proceed on that basis.

6 MR. HERDMAN: Before I do, Your Honor,
7 Mr. Pyle and I talked before Your Honor took the bench.
8 With respect to this audibility issue, this screeching that
9 Mr. Pyle has heard in his version of the audio/video, I have
10:02:43 10 not been able to detect that in the video that I reviewed.
11 I've spoken to the agents as well, and none of us could
12 detect it.

13 I think it might, unfortunately, be a problem
14 in the copying of the version that went to Mr. Pyle. We're
10:02:57 15 going to provide him with another copy today. I think for
16 purposes of this hearing, I think if it's going to be with
17 respect to Miranda issue and the voluntariness, I just don't
18 know that that is something that the court would need to
19 consider today. The video I'm going to play does not have
10:03:11 20 any of those -- any of that screeching noise in it.

21 THE COURT: Well, we have kind of a similar
22 issue in one of the earlier motions to suppress. I don't
23 remember anymore which defendant it was, but the agent
24 testified as to his recollection of the statements that he
10:03:32 25 contended were made by that particular defendant. And I

1 held that he can testify about that at the time of trial.

2 So this question of the audibility of the
3 recording, whether or not it's available, I'm not quite sure
4 I track what the position of counsel for Mr. Baxter is about
10:04:04 5 that particular recording, because if the agent is prepared
6 to testify about those statements, in my view, that's
7 admissible whether the recording is ineffective or not. The
8 testimony of the agent trumps whatever is in the video.

9 Now, it might be available for impeachment
10:04:22 10 purposes, but certainly the agent would not be forbidden
11 from testifying even if there's something defective about
12 the recording.

13 So I'm prepared to listen to what counsel has
14 to say on that issue.

10:04:41 15 Mr. Pyle, do you want to address that?

16 MR. PYLE: Your Honor, again, the copy of the
17 tape of my client's audio and video recording contain
18 excessive, I will call, periods of screeches where you can't
19 hear what was said. And, moreover, the little line that is
10:05:07 20 shown at the bottom of the video jumped, and naturally, it
21 gave us cause for concern.

22 If the government says that there was a
23 problem in copying and they are going to give us a copy
24 without the screeching or jumping of the lines, maybe the
10:05:25 25 court can defer ruling on any question about the technical

1 problems with the recording until I hear a, quote, "clean
2 copy."

3 THE COURT: But you still have your motion to
4 suppress based upon the arguments that you advance in your
10:05:39 5 memorandum.

6 MR. PYLE: Correct. That doesn't mean --

7 THE COURT: That's not affected by -- about
8 the nature of the recording, correct?

9 MR. PYLE: Correct.

10:05:51 10 THE COURT: Do you want to proceed with your
11 agent?

12 MR. HERDMAN: Yes, Your Honor.

13 THE COURT: Very well. Let's do that.

14 MR. HERDMAN: The United States will call
10:05:55 15 Special Agent Daniel Molina to the stand.

16 DANIEL MOLINA

17 of lawful age, a witness called by the United States, being
18 first duly sworn, was examined and testified as follows:

19 THE COURT: You may proceed.

11:01:51 20 DIRECT EXAMINATION OF DANIEL MOLINA

21 BY MR. HERDMAN:

22 Q. Good morning. Could you state and spell your name for
23 the record?

24 A. My name is Daniel Molina. D-A-N-I-E-L, last name
11:02:04 25 M-O-L-I-N-A.

1 Q. Where are you currently employed?

2 A. Employed by the FBI, Federal Bureau of Investigations.
3 Currently assigned to the Cleveland division in Cleveland,
4 Ohio.

11:02:15 5 Q. And how long have you been -- you're a special agent
6 with the FBI?

7 A. Yes, I am.

8 Q. How long have you been employed as a special agent with
9 the FBI?

11:02:22 10 A. For just over 15 years.

11 Q. I would like to direct your attention to the night of
12 April 30 of this year into the early morning hours of May 1
13 of this year.

14 Did you have cause to be part of an interview team of
11:02:40 15 some individuals who were arrested on the night of April 30?

16 A. Yes, I did. I was assigned -- the scope of my
17 assignment was to help with the interviews as they came in
18 to interview. I knew in advance the defendant Brandon
19 Baxter was one of my assignments to conduct an interview,
11:02:59 20 and I had one other assignment as well.

21 Q. So you did interview Brandon Baxter that evening?

22 A. Yes, I did.

23 Q. And approximately what time did you begin the interview
24 of the defendant?

11:03:12 25 A. It was about 12:30 in the morning on May 1, I believe.

1 **Q.** And what was -- did you have any other assignments that
2 night other than conducting interviews?

3 **A.** No, that was it. I just prepared for the interview and
4 that was it.

11:03:33 5 **Q.** And how would you describe your familiarity with the
6 criminal investigation into the defendant prior to
7 interviewing him on May 1, 2012?

8 **A.** I'm assigned to a counter-terrorism squad, so I sit in
9 close proximity to the agents on the other squad that were
11:03:50 10 involved in this investigation. So other than, you know,
11 light discussion I would overhear, I was aware that this
12 type of investigation was going on. Until my assignment,
13 which was late in the week before the arrests were made,
14 that I would be doing one of the interviews, I became much
11:04:10 15 more familiar with the case, primarily through the reading
16 of an affidavit that was used to -- as background for the
17 arrests.

18 **Q.** And that was an affidavit that was eventually used to
19 support a complaint and an arrest warrant?

11:04:25 20 **A.** That's correct.

21 **Q.** On the morning of May 1, can you describe the interview
22 room in which you conducted the interview of the defendant?

23 **A.** It's a carpeted room. There are no windows. It's an
24 interior space. It actually parallels several other
11:04:50 25 interview rooms where we conduct interviews of the general

1 public as well when they come in. But it's plain walls, and
2 it's 15 feet maybe by 10 feet in size.

3 It's got -- it had a normal government-style desk in it
4 and I believe about three chairs in it that were -- the way
11:05:11 5 we had things arranged on that day, we basically -- the
6 other agent that conducted the interview with me and I sat
7 with our sides near the desk and the defendant sat more or
8 less near the door or by the -- against the wall where
9 another chair was arranged. Excuse me, where another chair
11:05:32 10 was arranged.

11 **Q.** How would you describe the lighting in that room?

12 **A.** It was normal office lighting. It's fluorescent
13 lighting, I believe, in that room, and it's just nothing
14 special. It was just a normal office room.

11:05:47 15 **Q.** How would you describe the temperature or what you
16 remember of the temperature on the night of April 30 into
17 the morning of May 1?

18 **A.** In the room itself?

19 **Q.** Yes.

11:05:57 20 **A.** Normal temperature, between 75 and 79 degrees,
21 somewhere in there. It was comfortable.

22 **Q.** Could you please briefly describe for the court the
23 circumstances under which you first came into contact with
24 the defendant on the morning of May 1?

11:06:12 25 **A.** Yeah. I guess it was about 12:30, like I said, when

1 the interview started, so it would have been about that time
2 that another agent would have brought him up to the
3 interview room. That's how the operations were planned for
4 that evening.

11:06:27 5 So my first encounter with him was when he was brought,
6 he was restrained with his hands -- with handcuffs to the
7 rear of his body.

8 He was brought into the room, and I started to talk to
9 him, asked him if he could -- giving him some orders on what
11:06:47 10 to do as I uncuffed him, because we didn't want him to be
11 handcuffed while we were conducting the interview. And he
12 was very compliant and agreed to all the orders as we gave
13 them to him, basically, as we took the handcuffs off and
14 allowed him to sit in a chair and started to introduce
11:07:05 15 ourselves to him.

16 **Q.** Soon after he came into the room, did he make a request
17 of you?

18 **A.** He did. It was -- his appearance, he was a little bit
19 cold. It was obvious that he was cold. I am not sure he
11:07:19 20 was wet, but he expressed he was wet, and he was shivering a
21 bit. So I asked him myself whether he needed anything,
22 would he like a cup of coffee or something to help him warm
23 up, because I didn't want to start the interview with him
24 being so uncomfortable.

11:07:33 25 So I wanted to give him a chance to warm up and collect

1 himself a little bit. So he sat in the chair. He did
2 accept an offer, he asked for some coffee, which I had
3 arranged for another agent to go pick up.

4 And then he asked to use the restroom as well, which I
11:07:50 5 had to re-apply his handcuffs to the front so that he could
6 then be taken by another agent to the restroom, which is
7 down the hall, before being brought back into the room and
8 be allowed to drink his coffee and for a ten-minute period
9 where he just tried to warm up.

11:08:08 10 **Q.** During that time period, did you ask any questions of
11 the defendant that you thought were designed to elicit some
12 sort of incriminating response?

13 **A.** No, no. It was very light talk, if any, mostly
14 about -- regarding his comfort and whether -- as we observed
11:08:27 15 him warming up.

16 I may have asked him questions like, "Say, you live
17 around here," and that kind of thing, but nothing -- that
18 was kind of the point of the interview, was really to elicit
19 any information that he had regarding the crime he was being
11:08:40 20 accused of. We didn't get into any of that kind of
21 questioning at all.

22 **Q.** Now, prior to the interview with the defendant on May
23 1, 2012, were you aware of an alleged suicide attempt by the
24 defendant in February of that year?

11:08:56 25 **A.** No, I was not.

1 **Q.** Are you aware of it now?

2 **A.** I am.

3 **Q.** How are you aware of it?

4 **A.** I had a chance to review the motion filed by the
11:09:04 5 defense counsel, and that was the first I had read it. So
6 it was not a surprise to me, but it was new information to
7 me that that had occurred.

8 **Q.** When the defendant came back from the bathroom, you
9 said you gave him an opportunity to get comfortable. Did
11:09:25 10 you do something else after he came back from the bathroom
11 with respect to continuing the interview?

12 **A.** I started to -- once he was in a position where he
13 seemed comfortable and ready and not, you know, distracted
14 by other things, because I knew it was a pretty serious
11:09:44 15 thing we were about to engage in, which is this interview,
16 so I wanted -- once I assessed on my own, I guess, that he
17 seemed more clearheaded and not distracted by the other
18 issues of being cold and things like that, I started to
19 explain to him the reason for the interview and pertaining
11:10:04 20 to the events of that night and what the accusations were,
21 went through that with him at length.

22 I told him I did not want him to, you know, talk for
23 now, I just wanted to explain, give him a little bit of
24 background about what we're going to do, and I explained
11:10:20 25 those charges, what he was accused of. And I wanted to do

1 that just to prepare him so that he would be fully
2 knowledgeable about what we were about to discuss before
3 then engaging and advising him of his rights before
4 proceeding with the substantive portion of the interview.

11:10:38 5 **Q.** How did you advise the defendant of his rights?

6 **A.** We have a standard form, an FBI -- I think it's called
7 FD-395. But it's a standard advice of rights form, and it
8 contains what people normally refer to as Miranda warnings,
9 advising him of all his rights. I handed it to him and I
11:11:02 10 explained what that form was, and I handed it to him to
11 allow him to read on his own, which he did.

12 **Q.** Okay. It was your belief that the defendant understood
13 what was on the paper?

14 **A.** Yes.

11:11:14 15 **Q.** And how did you come to believe that?

16 **A.** Normally, my normal procedure, if I don't read them
17 aloud to a defendant, if they're able to read on their own
18 or if I ask them sometimes if they're able to read on their
19 own, I will let them read it. But my normal procedure would
11:11:32 20 be to ask him to read the last line, just so that we have a
21 good knowledge that he did know how to read even if he
22 just -- not that he just said he knew how to read.

23 But in this case, he got about two-thirds of the way
24 through the form, and he asked -- he read a part of the line
11:11:49 25 and then asked a short question regarding that line, so I

1 knew he was able to read acceptably, so that's how I knew he
2 was okay reading through the form.

3 Q. You said you -- your normal practice would be to have
4 the subject read the last line. Did you mean read that
11:12:07 5 aloud?

6 A. Yes.

7 Q. So the defendant asked a question about the form. What
8 is your best recollection of what that question was?

9 A. My best recollection is that he got to the part about
11:12:20 10 an attorney being appointed, if you couldn't afford one, and
11 he kind of started reading through the middle of the line
12 that said, "Attorney appointed, where would that be from," I
13 think was his question.

14 Q. And what's your best recollection of your response at
11:12:35 15 that time?

16 A. My response was that the AUSA and -- United States
17 Attorney and the judge would appoint -- appoint an attorney
18 for him if he couldn't afford one.

19 Q. And what informs the response you gave the defendant?
11:12:56 20 What were you thinking?

21 A. I think as I went back through my response, and even at
22 the time, I recall thinking, for me, of course, I'm not
23 really a part of the process of obtaining an attorney for a
24 defendant. If they asked for one, I would just at that
11:13:11 25 point terminate my interview and then inform the United

1 States Attorney, chief prosecutor on it, that or the
2 Assistant United States Attorney that's working with us, and
3 I would inform them and they would relay -- I'm not even
4 sure what the process exactly would be on their side of
11:13:29 5 relaying that through to follow-on judicial hearings.

6 But I knew that -- you know, the point was that the
7 judge would ultimately appoint an attorney for him, if he
8 needed one.

9 **Q.** And just to back up for just a second, did you ask the
11:13:46 10 defendant whether he could read before you handed him the
11 form on that night, that morning?

12 **A.** I'm not sure if I did or not, but I could -- I could
13 maybe make reference to the transcript, if you would like me
14 to review that.

11:13:58 15 **Q.** We might get to that in a minute.

16 Was there a recording of the interview with the
17 defendant?

18 **A.** There was.

19 **Q.** Was all of your interaction on the morning of May 1,
11:14:09 20 2012 -- I should say, was all of your conversation with the
21 defendant on the morning of May 1, 2012, on the video
22 recording?

23 **A.** Yes. It was all on at least the audio recording.
24 Sometimes we stepped out of the view as he was getting up,
11:14:24 25 coming into the room and things like that are not on the

1 video portion. But all of my interaction with the
2 defendant, except for a small portion, which I can explain
3 if you would like me to, but all of the interview itself was
4 all recorded.

11:14:36 5 Q. What was that additional interaction that was not
6 recorded?

7 A. I think it was later that evening, I saw the subject
8 downstairs again where he was being fingerprinted where we
9 do the normal processing of people that were arrested, and I
11:14:52 10 saw him sitting in a chair being held until -- I think they
11 were waiting on a van to take him over to the jail where
12 they would spend the night.

13 So I saw him at that point. We didn't really exchange
14 information or any dialogue. It was more or less -- I
11:15:07 15 believe he saw me, but I definitely saw him.

16 Q. I'm going to show you, Agent Molina, what's been
17 premarked as Government's Motion Exhibit 1.

18 MR. HERDMAN: May I approach, Your Honor?

19 THE COURT: Yes.

11:15:32 20 BY MR. HERDMAN:

21 Q. Do you recognize that?

22 A. Yes. It appears to be the copy of advice of rights
23 form.

24 Q. Does it have a signature on that?

11:15:38 25 A. Yes. It says, "Brandon Baxter."

1 **Q.** Did the defendant affix any additional notation of
2 something after the signature?

3 **A.** He did. He put the initials "TM" above his last --
4 just above and to the right of his last name.

11:15:50 5 **Q.** What does that seem to indicate to you?

6 **A.** You know, at first -- I actually noticed him make the
7 mark then. It wasn't until later I looked at it again later
8 that evening and I thought, "Well, I wonder what that
9 means," and I thought -- trademark came to mind. It was
11:16:04 10 that he might be -- consider his name trademarked.

11 **Q.** Was there an additional portion of that form below the
12 portion that the defendant signed by "Signature" that was
13 added to the form?

14 **A.** Yes. But just immediately below where his signature is
11:16:22 15 are spaces where the witnesses would sign it. That would
16 have been me and the other interviewer.

17 We also included a time when that signed signature
18 occurs.

19 I wrote in with my own hand, after explaining to him
11:16:36 20 that we would be video recording and audio recording the
21 interview, asked him if that was okay. I asked him to place
22 his initials next to the words "Authorization to record,"
23 which is what I wrote, which -- so it was something I added
24 to the form just to have some record of his affirmation that
11:16:55 25 it was okay to record the interview.

1 Q. Okay.

2 MR. HERDMAN: Your Honor, I would offer
3 Government's Motion Exhibit 1.

4 THE COURT: It's admitted.

11:17:05 5 MR. HERDMAN: Your Honor, at this time, I
6 would propose playing a portion of the video recording of
7 the interview of the defendant and the portion that Agent
8 Molina just testified to. I think it will go about 12 to 15
9 minutes.

11:17:19 10 THE COURT: You may proceed.

11 MR. HERDMAN: Thank you. This would be --
12 this disc will be provided to the court as Government's
13 Motion Exhibit 2.

14 I am also providing the court with a
11:17:30 15 transcript of the relevant portion that's being played.
16 It's 11 pages long. Counsel has already been provided a
17 copy.

18 Again, so the record is clear --

19 THE COURT: For the record, I am going to have
11:18:03 20 the court reporter transcribe the discussion that's on this
21 transcript, so in the event there's any appellate review,
22 they will have that transcript as part of the record.

23 MR. HERDMAN: Okay, Your Honor. And also for
24 the record, the videotape, which this is going to be --
11:18:21 25 denoted as session number 6 on the disc, that will be

1 provided to the court, and the start time is in the lower
2 right-hand corner, 23:32:59, and there's a date there before
3 that. It says "4-30-2012."

4 Your Honor, could I ask a brief question of
11:18:39 5 the witness before I start the video?

6 THE COURT: Would you repeat again what
7 you're --

8 MR. HERDMAN: On the video itself, Your Honor,
9 that I'm about to play, on the actual screen here, there is
11:18:51 10 a date and timestamp marking. That will indicate where we
11 started playing it, if there is appellate review, for
12 purposes of appellate review where we can mark where we
13 started playing the video.

14 THE COURT: Well, you're going to start with
11:19:04 15 the question, "Are you going to -- are you going to be
16 transporting later too, or --" is that what you're going to
17 start with?

18 MR. HERDMAN: Yes, Your Honor. That's the
19 portion of the video that is transcribed in the transcript.

11:19:19 20 THE COURT: Very well.

21 MR. HERDMAN: If I may briefly inquire of the
22 witness just one question.

23 THE COURT: Go ahead.

24 MR. HERDMAN: Thank you, Your Honor.

11:19:25 25 BY MR. HERDMAN:

1 **Q.** Agent Molina, on the videotape, there's -- I don't know
2 if you can see this or not, but it says that the date and
3 time -- it says "April 30, 2012," and the time is 23:32:59
4 military time.

11:19:42 5 What is your understanding of the time marker that is
6 on this video?

7 **A.** I noticed after the interview was conducted when I was
8 reviewing the video that the time was off by one hour, and
9 it turned out it was a technical problem that either the
11:20:00 10 time wasn't adjusted for daylight savings or something like
11 that, so it was off -- the entire video recording, the times
12 were recorded one hour earlier than the actual event
13 happened. So this would have been May 1, at 12 -- I guess
14 it would have been 1 -- 12:23 in the morning.

11:20:17 15 BY MR. HERDMAN:

16 **Q.** Okay. All right.

17 **A.** Sorry. 12:32 in the morning. That's right.

18 (Thereupon, the video was played as follows:

19 "MOLINA: Are you going to be transporting
11:20:35 20 later too, or --

21 PRESLEY: I'm going to hang. I probably will
22 be I would guess.

23 MOLINA: Do you want us to just keep those
24 then? Okay. Thanks. (UI conversation in background.)

11:20:44 25 You're Brandon?

1 BAXTER: Uh-huh.

2 MOLINA: You're shaking, brother.

3 BAXTER: I'm cold, man.

4 MOLINA: Is it pretty wet out there?

11:20:53 5 BAXTER: Yeah.

6 MOLINA: Listen, I'm gonna uncuff you.

7 BAXTER: Okay.

8 MOLINA: Is that going to be all right for me?

9 BAXTER: Yeah.

11:20:59 10 MOLINA: All right, that way you can get more
11 comfortable. If I can get these off, okay, just put your
12 hand kind of up by your head once I undo this.

13 BAXTER: My head?

14 MOLINA: Oh, yeah, just put it up on top of
11:21:11 15 your head for now.

16 BAXTER: Okay.

17 (Pause.)

18 MOLINA: (UI). Warm up a little bit, so (UI)
19 there we go. Okay. Go ahead and why don't you have a seat.
11:21:47 20 You want a cup of coffee or something?

21 BAXTER: Something warm, whatever.

22 MOLINA: Warm coffee would be good? Hot
23 chocolate or whatever?

24 (UI). Here's some change. There's a coffee
11:22:00 25 machine in there. You know where that is?

1 STARK: You take anything in it? Just black?

2 BAXTER: Black (UI).

3 MOLINA: All right. We'll get you something,
4 man. If there's hot chocolate or something, would you
11:22:13 5 prefer that if there is that?

6 BAXTER: (Shakes his head no.)

7 MOLINA: No. Coffee black.

8 (Pause.)

9 MOLINA: I feel for ya, man. Sorry. Is there
11:22:24 10 anything you want to do to try to warm up? I don't know
11 what else would help? Other than get something warm to
12 drink, to drink so --

13 BAXTER: I don't know.

14 (Pause.)

11:22:33 15 MOLINA: Where were ya before ya came up here?
16 Were you just down in the basement or --

17 BAXTER: They -- they kept calling it the
18 cage.

19 MOLINA: Oh, the cage. Yeah, it's kinda cold
11:23:03 20 down there.

21 STARK: It's not the best setup down there at
22 all.

23 MOLINA: No. Especially if you're coming in
24 wet, like you.

11:23:12 25 STARK: I had a coat on so (IU).

1 (Pause.)

2 MOLINA: You got family here in town?

3 BAXTER: Yeah, Lakewood.

4 STARK: Is this where they live?

11:24:01 5 BAXTER: Yeah.

6 STARK: 1522 Lane Avenue.

7 BAXTER: Yeah.

8 STARK: Is that where you live too?

9 BAXTER: I'm couch surfing.

11:24:07 10 STARK: What's that?

11 BAXTER: I'm couch surfing.

12 MOLINA: Couch surfing.

13 (Pause.)

14 MOLINA: My name is Dan Molina. I'm agent --

11:24:39 15 you probably met a bunch of agents already tonight, with the
16 FBI. This is -- this is Mike. Okay?

17 They asked us to, uh, to talk to you; okay?

18 But I want you to have some, uh, some coffee, try to warm up
19 a little bit before we do that. Okay?

11:25:00 20 BAXTER: Think I could use the bathroom, too?

21 MOLINA: Yeah, sure, sure. Do you want to do
22 that before you drink the coffee?

23 BAXTER: Yeah.

24 MOLINA: Really? That important? Okay. This
11:25:15 25 is what I'm gonna do, I'm gonna, uh, just to make it easier

1 on us, I'll put those cuffs back on, but I'm gonna put them
2 on in the front, okay? And then that way you can -- you can
3 handle yourself. Do you just have to go -- do you just have
4 to go pee or --

11:25:36 5 BAXTER: Yeah.

6 MOLINA: Stand up, and we'll do this."

7 (Video stopped.)

8 MR. HERDMAN: Your Honor, there's a period of
9 the video, this would be in evidence, where the defendant
11:25:42 10 actually is taken to the bathroom, so there's an empty
11 chair. So I'm going to fast forward to when he returns to
12 the room, and that's approximately two to three minutes
13 later. And this video starts at time stamp 23:40:59.

14 THE COURT: Thank you.

11:26:01 15 (Thereupon, the video was played as follows:

16 "MOLINA: All right. I'll leave it up to you.
17 You want those on or off?

18 BAXTER: (UI).

19 (Removes handcuffs.)

11:26:27 20 MOLINA: I'll get that coffee. You said you
21 have family in Lakewood? Is that parents?

22 BAXTER: My dad.

23 MOLINA: Any siblings? Do you have a sister?

24 BAXTER: I don't (UI) anymore.

11:26:50 25 MOLINA: You just had a birthday? So you get

1 to party at all? Celebrate?

2 BAXTER: (Shakes his head no.)

3 MOLINA: No?

4 BAXTER: No. Went to eat, about it.

11:27:02 5 MOLINA: All right. Is the coffee doin'
6 better for ya? All right. It's late. All right. I
7 understand that. And I just, uh, I guess we'll just start
8 by just tellin' ya why you're here. I don't know what
9 anyone's told ya, but let's just start from scratch, okay?
11:27:21 10 Um, because I'm sure it was kinda a surprise, uh, when you
11 guys got pulled over today, all right?

12 The reason that you're here and the reason we
13 want to talk to you is because, um, there's, uh, um, there's
14 a reason for -- for them to arrest you because they -- they
11:27:35 15 were, uh, thinkin' that you were involved in, uh -- with
16 some other people in a plan, uh, to blow up that bridge out
17 there in Sagamore Hills, okay?

18 And we got a lot of information to support
19 that. So, um, it's kinda, uh, important moment for you
11:27:56 20 right now because the charges that you might be facing, um,
21 may, uh, potentially put you, uh, in a bad position where
22 you can go to jail for a long time. All right?

23 And what we are here for is just because we
24 want to talk and give you a chance to tell your side of the
11:28:08 25 story and to, uh, uh, to be truthful with us. Because we

1 know that, if you're truthful with us, that that -- we can
2 pass that on to the prosecutors and they can take that into
3 consideration, um, as they're trying to process, uh, the
4 prosecution. Okay?

11:28:28 5 When they -- they, uh, they'll take whatever
6 it is you can tell us about the other parties that are
7 involved and things like that, and they're take that into
8 consideration. All right?

9 Um, right now, the charge, even the charges
11:28:46 10 that they are considering charging you with, um, you're
11 looking at, we're talking 20 years, um, additional charges
12 up to 30 years in prison, okay? And this is not, uh, you
13 know, the FBI, the way we do things, we don't, we don't,
14 just, uh, uh, find something out and look at it for a week.
11:29:03 15 Okay, this is, we've had this investigation going on for
16 several months, so we kinda know quite a bit, uh, between
17 different places that we have, uh, available to us to get
18 information about it. Okay? Do you understand that?

19 All right. So, um, we'd like to know as many
11:29:21 20 details as you are willing to, uh, talk to us about it, um,
21 but the way our process is set up, we also want to make sure
22 that you understand what your rights are before you talk to
23 us. Okay?

24 If you think you want to talk to us, we'll be
11:29:35 25 happy to read that to you and you can -- you can, uh, talk

1 to us, ask us questions, whatever you feel comfortable with
2 and at any time, you can, uh, decide you don't want to talk
3 to us, um, we can do that too. All right?

4 BAXTER: I'm very aware that I have no rights,
11:29:56 5 so I'm going to stick with good cop right now.

6 MOLINA: Okay. Well, when you read, uh, we
7 have a standard form, make sure you go through these things.
8 Can you read okay?

9 BAXTER: Yeah.

11:30:09 10 MOLINA: Wanna read through that? It just
11 starts here, goes down to here.

12 (Pause while Baxter reads.)

13 BAXTER: Cannot afford a lawyer, where would
14 one be appointed from?

11:30:25 15 MOLINA: Uh, the, uh, U.S. Attorney's Office
16 and the, uh, the judge would appoint an attorney for you.
17 'K? All right. So before we can proceed, um, getting your
18 story, if you don't mind, I would like you to write down
19 some things at the top here. Today is the 31st now --

11:30:45 20 STARK: 30th. Well, no, it's May 1st.

21 MOLINA: Is it 5-1?

22 STARK: It's May 1st. You understand
23 everything that is on there? And are you willing to talk to
24 us?

11:30:58 25 (Nods yes.)

1 Okay? If you could, don't mind signing right
2 where it says sign and we will sign as witnesses. All
3 right. And we're also, uh, we're gonna record this, uh,
4 this interview just so that you know what you are saying is
11:31:18 5 exactly what's recorded for posterity.

6 BAXTER: Okay.

7 MOLINA: So you don't have to rely on what we
8 say you said, it's exactly what you say. All right?

9 (Pause.)

11:31:31 10 MOLINA: This is just authorization to record.
11 If you could initial right there for me, I'd appreciate it.

12 (Pause.)

13 MOLINA: Warming up? You look better. Now,
14 why don't you, uh, take your time and I'm gonna start with,
11:31:43 15 uh, wherever you want to start, okay? Because, you know,
16 you know the people that were involved in this, you know
17 when, you've been planning, and -- and what your involvement
18 is."

19 (Video stopped.)

11:34:14 20 MR. HERDMAN: I'm going to stop the video at
21 this point at 23:49:08.

22 THE COURT: Well, we're right in the middle
23 of -- Molina is saying -- you don't want to complete that?

24 MR. HERDMAN: I'm sorry, Your Honor?

11:34:32 25 THE COURT: Why are we stopping?

1 MR. HERDMAN: I stopped -- this was the
2 portion that I thought was relevant to the actual advisement
3 of the rights. Agent Molina had not yet testified with
4 respect to any incriminating statements made by the
11:34:49 5 defendant.

6 THE COURT: Well, you interrupt where Molina
7 was saying, "Warming up? You look better," and I wanted to
8 hear that entire statement by Molina.

9 MR. HERDMAN: Okay, Your Honor. I will
11:34:57 10 continue playing through the end of that paragraph by the
11 agent.

12 (Thereupon, the video was played as follows:

13 "MOLINA: So I want to hear it in your own
14 words what you think, uh, uh, well, exactly what happened
11:35:13 15 with relation to, uh, what ended tonight."

16 (Video stopped.)

17 MR. HERDMAN: Your Honor, would now be an
18 appropriate place to stop the video?

19 THE COURT: Did we get where he said, "What
11:35:18 20 ended tonight"?

21 MR. HERDMAN: Yes, Your Honor.

22 THE COURT: All right. Now, you want to stop
23 the video for what purpose?

24 MR. HERDMAN: To re-inquire of the witness as
11:35:26 25 to --

1 THE COURT: Very well. Go ahead.

2 MR. HERDMAN: Thank you, Your Honor.

3 BY MR. HERDMAN:

4 Q. Now, Agent Molina, we've just played a portion of the
11:35:47 5 video relating to what you just testified to with respect to
6 the advice of rights.

7 Following that advice of rights, approximately how long
8 did you speak to the defendant for?

9 A. A total, it was about two hours. This is, I would
11:36:07 10 say -- from the beginning of the interview itself, I'm not
11 sure exactly -- advice of rights was probably completed by
12 15 minutes in, so it was probably another hour and 45
13 minutes. The main portion of my interview of him took
14 another hour or 45 minutes to an hour before we took a break
11:36:25 15 and another interviewer, Ryan Taylor, came in and
16 interviewed him for about 35 minutes at the end of the
17 interview.

18 Q. Were you still present throughout that second part of
19 the interview where Agent Taylor was doing the questioning?

11:36:38 20 A. I was. I was not present for about 15 minutes in the
21 middle of the interview when we took a break from the
22 interview, actually, and Special Agent Michael Stark, who
23 was my co-interviewer at the beginning of the interview,
24 stayed with him while I went into the hallway for a break
11:36:54 25 and to talk to Special Agent Taylor.

1 **Q.** And during the course of that roughly two hours that
2 you were speaking to the defendant or in close proximity to
3 the defendant, did you smell an alcoholic beverage on him at
4 all?

11:37:06 5 **A.** No.

6 **Q.** Did he appear to you to be intoxicated at all?

7 **A.** No.

8 **Q.** To you, did he appear to be under the influence of any
9 sort of substance or medication?

11:37:17 10 **A.** No, he did not.

11 **Q.** Did he appear to you to be confused, have a lack of
12 mental understanding as to what was going on?

13 **A.** No, not at all. Other than when we first came in, he
14 was agitated because he was cold. But once that period was
11:37:32 15 over, he seemed very coherent and clear-thinking during the
16 interview.

17 **Q.** Could you please briefly describe for the court what
18 the purpose of the interview was from your perspective as
19 the interviewing agent that night?

11:37:46 20 **A.** It's kind of -- there are two prongs to what I had
21 thought that I would be trying to get to during the course
22 of the interview. One, primarily during some point in the
23 interview, I wanted to address any outstanding threats that
24 were still potentially planned or that he was aware of.

11:38:07 25 There were other events happening around the U.S. in

1 the coming days, and there was some concern that because of
2 what -- we thought he was involved with, that he would know
3 about other plots. And there were some other equipment that
4 was purchased and things like that. We weren't sure whether
11:38:25 5 that was going to be applied to other plots.

6 So the primary reason was a public safety reason. I
7 had to get to some questions along those lines to make sure
8 he was not knowledgeable of something that could be an
9 imminent threat.

11:38:43 10 But the majority of the interview revolved around just
11 obtaining truthful information from him, regarding to fill
12 in the gaps or to corroborate what we believe we already
13 knew had occurred regarding the conspiracy or the group
14 getting together and planning to plant the explosives under
11:39:02 15 the bridge.

16 **Q.** And, I guess, regarding that criminal portion of the
17 investigation or the investigation into the conspiracy, as
18 you put it, during the course of your interview of the
19 defendant, did he make any incriminating statements with
11:39:15 20 respect to that conspiracy?

21 **A.** He did. Pretty early on, I pretty much just allowed
22 him to tell the story starting with the night of the arrest,
23 and pretty early on, he started talking about his -- what
24 his role was, that he was supposed to be kind of a scout for
11:39:36 25 the others while the explosives were planted and placed. He

1 knew where they were going to be placed, but he would stay
2 more along the road and watch for people that would come.

3 He talked about early on, although he changed what he
4 said later on, early on, he said the intent was to bring the
11:39:53 5 bridge down, and although later, he said that he didn't
6 think it really was enough explosives to bring down the
7 bridge totally, but he wanted to have some kind of an
8 economic impact by stopping traffic on the bridge for a
9 while.

11:40:10 10 He talked about thinking that they were just going to
11 plant the explosives today and they would be detonated the
12 next day or another time, and so -- and then toward the end,
13 he talked about how the detonation was supposed to occur, it
14 was through a cell phone, calling another cell phone that
11:40:30 15 was in the device itself and causing the detonation.

16 So those are just a few examples of things he said.

17 **Q.** Did the defendant express a knowledge or belief as to
18 what type of explosives were in the devices?

19 **A.** He did. He mentioned that it was C-4. I believe it
11:40:45 20 was four pounds of C-4 in each device.

21 **Q.** Did the defendant make any statements that you
22 considered to be incriminating of his other conspirators?

23 **A.** Yes, he did. He identified, in addition to himself, at
24 the early part of the interview, he said -- he referred to
11:41:07 25 the others as, you know, "The other guys that were arrested

1 with me."

2 He wouldn't actually express who they were by name, but
3 as the interview went on, he talked about Doug, who I
4 believe is Douglas Wright, and he talked about meeting
11:41:27 5 another individual who had sold them the explosives, and a
6 meeting in the hotel that he -- where he met with Doug and
7 that other person who sold the explosives and an FBI
8 informant that he was not aware was an informant at the
9 time, but he was an FBI informant employee at the hotel.

11:41:46 10 He also named Doug, Connor, Skully and Stafford and
11 other names that were involved, and those were the
12 individuals that were arrested that night, we believe.

13 Q. At any point in time during your interaction or
14 conversation with the defendant, did you ever threaten him
11:42:04 15 in any way?

16 A. No.

17 Q. Did you ever make any promises to the defendant?

18 A. No, nothing -- I mean, only thing we do pass on, as you
19 saw in the -- early in the tape is that the information
11:42:20 20 provided to us is passed on to the United States Attorney
21 and that, of course, if he's truthful, that would be looked
22 at as helpful to him, especially if he provided information
23 on others.

24 Q. Did you ever -- was there any sort of complaint by the
11:42:37 25 defendant of his treatment by you or by any of the other

1 agents that you're aware of?

2 **A.** No.

3 MR. HERDMAN: Just a moment, Your Honor, if I
4 may.

11:42:46 5 BY MR. HERDMAN:

6 **Q.** At any point during the two hours, did he ever ask to
7 cease or stop the questioning?

8 **A.** No, not that I recall.

9 **Q.** Did he ever request an attorney?

11:43:18 10 **A.** No.

11 MR. HERDMAN: I have nothing further, Your
12 Honor. Thank you.

13 THE COURT: The answer "not that I recall" is
14 what I call a limp leg. You don't recall whether he asked
11:43:30 15 to stop? That's my question to you.

16 THE WITNESS: I can revise my statement. He
17 did not ask to stop the interview. I think that would have
18 stuck in my mind, so --

19 THE COURT: All right. Does that conclude
11:43:47 20 your direct?

21 MR. HERDMAN: It does, Your Honor.

22 THE COURT: You may cross-examine.

23 CROSS-EXAMINATION OF DANIEL MOLINA

24 BY MR. PYLE:

11:43:52 25 **Q.** Good morning.

1 **A.** Good morning.

2 **Q.** I want to start by asking you a few questions to
3 reconfirm the information you had about Brandon Baxter
4 before you started the interrogation. Okay?

11:44:15 5 **A.** Okay.

6 **Q.** First of all, you knew he just turned 20 years old,
7 that's reflected in what we've seen already?

8 **A.** Yes.

9 **Q.** His birthday was April 27?

11:44:27 10 **A.** You're asking if --

11 **Q.** I'm asking you.

12 **A.** I'm not -- I can't recall, but -- I can look at some
13 information and try to verify that. I knew it was within
14 recent days.

11:44:40 15 **Q.** Recent days?

16 **A.** Yes.

17 **Q.** So you know that in terms of the events that led up to
18 his arrest, he had been 19 years old; am I right?

19 **A.** Yes, that would be true.

11:44:52 20 **Q.** Now, in terms of background gathering you did before
21 the interrogation, are you telling the court that you, you,
22 meaning the FBI, never checked his arrest records, never
23 checked his background?

24 **A.** Yes, I did.

11:45:09 25 **Q.** You did?

1 **A.** Yes. I'm sure the case agents also did. But in my
2 preparations, I did review his criminal history.

3 **Q.** And what criminal history did you learn about?

4 **A.** Boy, I can't recall, but I do -- I have a folder that I
11:45:24 5 used at the time, and it does include a tab with his
6 criminal history. I could review it now and --

7 **Q.** Would you?

8 **A.** I know for sure during the interview, I talked to him
9 about a restraining order that had shown up in the criminal
11:45:42 10 history, and we mentioned that during the course of the
11 interview.

12 **Q.** Would you refresh your recollection from whatever
13 documents you have available concerning the background, both
14 criminal and otherwise that you knew about?

11:47:08 15 **A.** Okay.

16 **Q.** Again, my question was, what information did you have
17 about his background, including his criminal history
18 background?

19 **A.** I knew that he had been arrested on a couple of
11:47:20 20 occasions. I would have known at the time that the --
21 according to these documents, Rocky River, Lakewood,
22 Cleveland PD, that he had some involvement with them, but --
23 from what I could tell, there's -- from what I could tell,
24 no -- there was not in the end prosecuted for that one.

11:47:46 25 And I knew that there was some kind of a restraining

1 order, which I mentioned earlier, with regard to another
2 individual, and I didn't know who that individual was
3 exactly, but he was able to clarify that during the
4 interview.

11:48:00 5 Q. That was his stepfather?

6 A. Yes, that's right.

7 Q. Now, in regard to the Rocky River arrest, do the
8 records reflect that that arrest was February 16, 17, 18 of
9 2012?

11:48:14 10 A. Has a case filing date of February 15, 2012.

11 Q. Okay. And did you follow up with that to confirm that
12 that had to do with his attempted suicide?

13 A. No, I did not.

14 Q. Did you do any follow-up to see what that related to?

11:48:35 15 A. No, I did not.

16 Q. Did you have any records available in front of you
17 concerning his stay in Parmadale until his 18th birthday
18 pursuant to a juvenile court order?

19 A. I'm not familiar with Parmadale, but that would have
11:49:03 20 rung a bell. I had no -- nothing that indicated to me in my
21 review that he was involved in the juvenile court system.

22 Q. I want to ask you some questions now about the events
23 immediately at the time of his arrest before he came to your
24 office for this interrogation.

11:49:28 25 A. Okay.

1 Q. You were part of the arrest team?

2 A. I was not.

3 Q. Did you have information from other agents before you
4 began the interrogation about what happened shortly before
11:49:41 5 his arrest? I am referring specifically to what happened at
6 that restaurant.

7 A. I was aware that they went to a restaurant. I was
8 present in the command post that we had set up for the
9 arrest that evening, and so I was aware through just the
11:49:58 10 different sources of information that we had that they went
11 to the restaurant, it's an Applebee's restaurant, after
12 planting the explosives, what they thought to be explosives,
13 so, yes, I was aware.

14 Q. And you knew that you -- I guess everybody has to call
11:50:15 15 him the CHS, had bought the men, meaning the defendants'
16 meals that night at the restaurant?

17 A. I was not aware of that when I did the interview.

18 Q. Were you aware that the CHS had bought them alcoholic
19 drinks?

11:50:33 20 A. I was not aware of that.

21 Q. Were you aware from the debriefings of the CHS that he
22 had previously supplied Brandon Baxter with a narcotic drug,
23 a pill?

24 A. No, I was not aware of that.

11:50:44 25 Q. Were you involved in any debriefings of the CHS either

1 that night or on previous nights?

2 **A.** No, I was not.

3 **Q.** Had you met the CHS?

4 **A.** No.

11:50:53 5 **Q.** Now I want to ask you questions about what was
6 happening there at the interrogation room immediately before
7 questioning Brandon.

8 **A.** Okay.

9 **Q.** Now, it's not entirely clear from the video here that
11:51:14 10 when Brandon Baxter came in, he was wet?

11 **A.** Yeah. It wasn't entirely clear to me either, but I
12 think during the course of the interview, at some point he
13 mentioned being wet. He definitely mentioned being cold.

14 **Q.** You certainly know the background that the men -- the
11:51:30 15 defendants had been standing around this bridge with fake
16 explosives and so on and so forth and it had been raining?

17 **A.** Actually, I wasn't aware that it was raining when they
18 were planting the explosives, but I was aware during the
19 arrest that it was raining outside, yes. So they would have
11:51:45 20 been wet.

21 **Q.** They were fake explosives?

22 **A.** Yeah. What they pur- -- what they thought were
23 explosives.

24 **Q.** So you grudgingly admit that he was wet; yes?

11:52:00 25 **MR. HERDMAN:** Judge, I object to the

1 characterization.

2 THE COURT: Sustained.

3 BY MR. PYLE:

4 **Q.** He was definitely cold?

11:52:08 5 **A.** He appeared to be cold, yes.

6 **Q.** He was shaking, or so it appears, in the video?

7 **A.** Yes.

8 **Q.** It was 12:30 at night, right?

9 **A.** That's correct.

11:52:14 10 **Q.** You don't know how much sleep or lack of sleep he had
11 received the previous night?

12 **A.** No, I don't.

13 **Q.** You don't know what, if anything, he had to eat that
14 day?

11:52:24 15 **A.** That's correct, I don't know what he had to eat that
16 day.

17 **Q.** You didn't -- as I understand it, you didn't inquire
18 about whether the CHS had bought alcohol for them at the
19 restaurant?

11:52:36 20 **A.** I definitely did not inquire as to whether the CHS
21 bought alcohol for them.

22 **Q.** And then you began your interrogation?

23 **A.** As I described, yeah, I didn't begin my interrogation
24 immediately, but we took some time to make sure that he was
11:52:58 25 warm and in more of a state where he would be receptive to

1 questions.

2 Q. But the -- I'm going to backtrack for a question or
3 two. You knew that the arrest team consisted of multiple
4 officers?

11:53:14 5 A. That's correct.

6 Q. Couple dozen at least, right?

7 A. I'm not sure the total number, but it's possible.

8 Q. They had -- they were all wearing, you know, flak
9 vests, you know, weapons of different kinds, side arms,
11:53:30 10 rifles, heavily armed?

11 A. Yes, sir.

12 Q. Okay?

13 A. Yes.

14 Q. So he was arrested by this team of heavily armed men,
11:53:38 15 brought to your office, and how long did he wait there
16 before the interrogation began?

17 A. I don't know exactly when, but I can estimate that it
18 was probably in the order of an hour to an hour and a half.

19 Q. Okay. In your office, wet, cold, you bring him in and
11:53:56 20 you did give him coffee?

21 A. Yes.

22 Q. And you were talking to him, and you described the
23 penalties, potential penalties, 20, 30 years; you told him
24 that?

11:54:08 25 A. Yes.

1 **Q.** You told him that what he said could help him with the
2 U.S. Attorney's Office or with the prosecutor?

3 **A.** I would have to refer to the transcript again to be
4 sure, but I know that I said that we would relay the
11:54:21 5 information to the prosecutor and that truthful information
6 could only benefit him.

7 **Q.** Okay. Next, I want to invite your attention to page --

8 THE COURT: Of the transcript?

9 MR. PYLE: Yes, sir.

11:54:51 10 THE WITNESS: I'll need a copy of the
11 transcript with the page numbers, please.

12 Thank you, sir.

13 BY MR. PYLE:

14 **Q.** You have page 7?

11:55:08 15 **A.** Yes, I do.

16 **Q.** Top of the page, to set the context, you had given him
17 a copy of the rights form before you get to this point or
18 not?

19 **A.** At the top of the page, I don't believe I have given
11:55:34 20 him the form until about midway through the page.

21 **Q.** Okay. Going back to page 6, just briefly to set the
22 context, you say, "But the way our process is set up, we
23 also want to make sure that you understand what your rights
24 are before you talk to us. Okay? If you think you want to
11:56:03 25 talk to us, we'll be happy to read that to you and you

1 can -- you can talk to us, ask us questions, whatever you
2 feel comfortable with and at any time, you can, uh, decide
3 you don't want to talk to us, we can do that too. All
4 right?"

11:56:24 5 **A.** Yes.

6 **Q.** That's the lead-up. And he says, "I'm very aware that
7 I have no rights, so I'm going to stick with good cop right
8 now."

9 **A.** Yes.

11:56:34 10 **Q.** Is that what you heard him say? Because it wasn't
11 clear to me.

12 **A.** That is what I heard him say.

13 **Q.** And instead of saying, "No, you're wrong, you have
14 rights," you went right into the, "Well, we have a standard
11:56:54 15 form"?

16 **A.** I actually mentioned that we had a standard form, and I
17 asked him to make sure he went through those, which were a
18 list of his rights. So even if his -- my perception was
19 that even if he felt he had no rights, I was about to show
11:57:12 20 him that he did indeed have rights.

21 **Q.** Were you aware that it was approximately this time when
22 there was legislation pending to the effect that people
23 arrested for certain crimes were not to be given Miranda
24 rights, that they essentially had no rights?

11:57:31 25 **MR. HERDMAN:** I would object to the relevance

1 of that question.

2 THE COURT: It's cross-examination.

3 Overruled.

4 THE WITNESS: Will you repeat the question?

11:57:39 5 BY MR. PYLE:

6 Q. Were you aware that in approximately April of 2012,
7 there were congressional inquiries, national discussion, if
8 you will, about not giving, quote, unquote, "terrorists"
9 advice of rights forms of any kind?

11:57:55 10 THE COURT: The question is, were you aware of
11 that?

12 THE WITNESS: I'm not sure I was aware of
13 something specifically in that time frame, but I think
14 that's been discussed over the last several years, and I was
11:58:08 15 aware of that, yes.

16 BY MR. PYLE:

17 Q. Did it strike you -- did it strike you as unusual that
18 he would say, "I'm very aware that I have no rights"?

19 A. No. My perception when he said that was -- it was kind
11:58:31 20 of a defiant attitude toward police, and that, in effect, he
21 really didn't have rights. It was his way of just stating
22 something that I thought that he even knew wasn't true, and
23 that's why I proceeded to make sure that he understood what
24 his rights were.

11:58:53 25 Q. Well, then you -- what you proceeded to do was just

1 give him this form and have him read it; am I right?

2 **A.** That's correct.

3 **Q.** And he's reading it and it says, according to the
4 transcript, "Cannot afford a lawyer, where would one be
11:59:09 5 appointed from?"

6 **A.** Yes.

7 **Q.** And there's no question the first words out of your
8 mouth were, "Uh, the U.S. Attorney's Office," and I realize
9 you continue, but that was the first thing you said?

11:59:25 10 **A.** Yes.

11 **Q.** And the U.S. Attorney's Office is the federal
12 prosecutor's office?

13 **A.** Yes.

14 **Q.** And that's not true?

11:59:31 15 **A.** That's correct.

16 **Q.** And you never -- other than saying, "Uh, the judge
17 would appoint an attorney for you," I mean, you never
18 clarified that remark you made about the U.S. Attorney's
19 Office being involved in the process?

11:59:44 20 **A.** I think the reason for my pause was because I
21 immediately knew that what I had just said, the U.S.
22 Attorney's Office, was more for me, because that's where I
23 would go to make sure that he got -- that the U.S.
24 Attorney's Office was aware that he needed an attorney, and
11:59:59 25 I paused and rephrased it as, "The judge would appoint an

1 attorney for you."

2 Q. Now, for sure, you never told him that at his trial,
3 that the prosecutors would not be allowed to comment in any
4 form whatsoever if he failed to answer your questions or
12:00:21 5 asserted his right to counsel? You never told him that, did
6 you?

7 A. That's correct.

8 Q. And then the interrogation continued, you said, for two
9 hours, plus?

12:00:38 10 A. It was under that. But from this point on, it was
11 probably an hour and 50 minutes.

12 THE COURT: Can I interrupt and ask what
13 instructions you receive from your superiors at the FBI as
14 to how to respond to the question, "Where would one be
12:00:59 15 appointed for me?"

16 When the person you want to interview talks
17 about the right to a lawyer, do you have any instructions as
18 to how to respond to that question, if you recall?

19 THE WITNESS: I can't recall. It would have
12:01:19 20 been some time ago. But our practice would be just to make
21 sure that they're aware that they can -- they can have
22 access to a lawyer if they wanted to before --

23 THE COURT: How are they going to get access
24 to a lawyer? You're interviewing him now, you've got him in
12:01:35 25 the FBI office and they say, "I want a lawyer."

1 What are you going to do next?

2 THE WITNESS: I would terminate the interview
3 and he would be -- I would terminate the interview. I
4 wouldn't proceed.

12:01:47 5 THE COURT: You don't have the power to get
6 him a lawyer, do you?

7 THE WITNESS: I do not.

8 THE COURT: Why do you tell him that the judge
9 would -- U.S. Attorney's Office or the judge would appoint
12:01:57 10 an attorney?

11 Why do you give him that statement?

12 THE WITNESS: My perception at the time was
13 that he would then be processed through the rest of his
14 booking. He would go for -- his next judicial process would
12:02:12 15 be an initial appearance of some sort where he would --

16 THE COURT: First he's got to be arrested,
17 doesn't he?

18 THE WITNESS: He was -- at that point, he had
19 already been arrested.

12:02:19 20 THE COURT: All right. So did you have a date
21 when he was going to appear before a judicial officer?

22 THE WITNESS: I did not. But the standard
23 process, as I understand it, is that he would be afforded an
24 opportunity in front of a judge where he would be told about
12:02:40 25 his charges formally and would be able to express whether or

1 not he could afford an attorney, those kinds of things, and
2 one may be appointed for him.

3 So I just -- that is what I expressed to him
4 and said the judge -- a judge would appoint an attorney. He
12:02:58 5 would have access to an attorney whenever he wanted to.

6 THE COURT: We will take the noon recess at
7 this time. We will resume at 1:00.

8 (Thereupon, a luncheon recess was taken.)
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1 (Afternoon Proceedings.)

2 THE COURT: Can the witness take the stand
3 again, please?

4 You may continue.

13:03:15 5 By MR. PYLE:

6 Q. You organized there?

7 A. Yes, I am.

8 Q. I just have one follow-up question. This morning I was
9 asking you about an act of Congress concerning suspected
13:03:29 10 terrorists being advised of rights to remain silent and so
11 forth.

12 What I was intending to ask about was something called
13 the National Defense Authorization Act.

14 Do you know the law to which I am referring to?

13:03:49 15 A. Yes, I do.

16 Q. That was a law that was in effect at the time of this
17 interrogation, was it not?

18 A. I'm not sure if it was or not.

19 Q. But you know that the law, as you understood it,
13:04:02 20 provided that suspected terrorists would have no rights --
21 to be advised of no rights?

22 A. No, I wasn't aware of that even.

23 Q. What was your understanding about the impact of that?

24 A. I think I had just -- I may have read in papers or
13:04:18 25 something like that, again, over the course of years, but

1 leading up to the act, you're referring to -- I think the
2 only thing I looked at in detail to that was in the -- there
3 was some controversy over the military being able to --
4 there being a lot of assessment as to whether or not the
13:04:43 5 military would take them into custody or domestic law
6 enforcement.

7 MR. PYLE: Those are my questions. Thank you.

8 THE COURT: Any redirect?

9 MR. HERDMAN: Briefly, Your Honor. Thank you.

13:04:54 10 REDIRECT EXAMINATION OF DANIEL MOLINA

11 BY MR. HERDMAN:

12 Q. Agent Molina, you referred to a document on your
13 cross-examination that referenced the defendant's arrest
14 record, I believe?

13:05:05 15 A. Yes, sir.

16 Q. And there was a particular arrest that Mr. Pyle asked
17 you about. It took place on February 15, or at least I
18 think your testimony was the case was filed February 15,
19 2012?

13:05:15 20 A. That's correct.

21 Q. What was the criminal violation that's outlined on that
22 criminal history there?

23 A. I don't see any criminal violation listed there. The
24 closest it gets is the case -- sometimes is a misdemeanor,
13:05:55 25 and it's an undisposed case.

1 **Q.** And just to briefly redirect your attention back to
2 that transcript, that 11-page portion of the transcript. If
3 I could direct your attention to page 7.

4 The defendant said, "Cannot afford a lawyer, where
13:06:20 5 would one be appointed from?"

6 Then it says, "Molina: Uh, the U.S. Attorney's
7 Office," and how did you finish that sentence?

8 **A.** Transcript says, "and the judge would appoint an
9 attorney for you." Just the sentence or the paragraph?

13:06:40 10 **Q.** Just that sentence.

11 **A.** "The judge would appoint an attorney for you."

12 **Q.** You stated on your direct testimony, I think also on
13 cross, that you were aware that the defendant had
14 acknowledged that statement from you?

13:06:54 15 **A.** Yes.

16 **Q.** Do you remember seeing something on the video that
17 indicated that defendant having acknowledged that particular
18 statement?

19 **A.** Yes. He kind of looked back to the form after I had
13:07:04 20 told him those words, and then did a subtle nod and handed
21 it back as though he was fine with the rest of what was
22 written there.

23 Also, Agent Stark had pointed out to him after he'd
24 done that, before he signed it, he said, "Do you understand
13:07:22 25 everything that's on there, and are you willing to talk to

1 us?"

2 Q. And Mr. Baxter nodded?

3 A. Yes.

4 MR. HERDMAN: I have nothing further, Your
13:07:34 5 Honor. Thank you.

6 THE COURT: Are you suggesting to a defendant
7 that if they cooperate, they may be entitled to more relief
8 in connection with their conduct?

9 THE WITNESS: In what context, sir?

13:07:59 10 THE COURT: Well, at the bottom of page 5, top
11 of page 6 of the transcript, "And what we are here for is
12 just because we want to talk to you and give you a chance to
13 tell your side of the story and to be truthful with us.
14 Because we know that if you're truthful with us, that we can
13:08:28 15 pass that onto the prosecutors and they can take that into
16 consideration as they're trying to process the prosecution."

17 So it sounds to me like you're saying, "If
18 you're truthful with us, then it will be to your benefit,"
19 and is that the impression you were attempting to relay to
13:08:55 20 the defendant?

21 THE WITNESS: I think the impression I was
22 trying to leave with him was that this was an opportunity
23 for him to answer our questions, and that we would relay
24 our -- our job, as we're instructed, is to simply relay the
13:09:13 25 information that we get from the defendant to the prosecutor

1 to document.

2 THE COURT: You don't think you were
3 suggesting to him that it would be for his benefit if he
4 were to respond to your questions?

13:09:28 5 THE WITNESS: It wasn't the intent of my --
6 what I said there was to --

7 THE COURT: Why do you tell him you would pass
8 the information to the prosecution if it will not be for his
9 benefit?

13:09:49 10 THE WITNESS: Because that's what I plan to
11 do. I mean, sir, when we interview someone, our job is to
12 document the facts as they present them to us to the
13 prosecutor. That's what I plan to do and that's what I was
14 telling him what I planned to do.

13:10:08 15 THE COURT: So you're not attempting to leave
16 the impression that if he talks to you, that it's somehow
17 going to be to his benefit?

18 THE WITNESS: I could understand how he might
19 take that from it, but that's not my only intention. My
13:10:27 20 intention is to relay to him what I plan to do.

21 THE COURT: Why do you delay reading him his
22 rights? Why isn't it the first thing you do?

23 THE WITNESS: My intent --

24 THE COURT: No. I am asking you, why do you
13:10:42 25 delay reading him his rights?

1 THE WITNESS: Because my understanding of
2 advice of rights and Miranda is they have to be relayed
3 prior to questioning the subject or doing something that
4 would elicit some kind of substantive response from him.
13:10:58 5 And so my intent is to just relay the seriousness of what we
6 were about to talk about and, therefore, I didn't see the
7 need for Miranda warnings to be read until I had a feeling
8 that we were going to proceed with the interview.

9 THE COURT: Do you have the transcript in
13:11:13 10 front of you?

11 THE WITNESS: I do, sir.

12 THE COURT: Well, look at page 5. It says,
13 "Let's just start from scratch," "the reason we want to talk
14 to you."

13:11:40 15 Why did you not initiate that discussion with
16 his constitutional rights?

17 THE WITNESS: Again, my intention is to make
18 sure he understood his rights.

19 THE COURT: My question is, why don't you
13:11:50 20 advise him of his constitutional rights at the beginning?

21 THE WITNESS: Because it's -- may be flawed,
22 but my understanding of Miranda is that it doesn't attach
23 until I am trying to elicit a comment back from him that
24 might be substantive.

13:12:07 25 THE COURT: Why do you go through all these

1 comments if you're not trying to elicit a response from him
2 when you talk for more than a page about all the information
3 that you have?

4 THE WITNESS: No. My purpose was to elicit
13:12:23 5 deep thought about the seriousness about what we were about
6 to discuss.

7 THE COURT: And after he says to you, "I'm
8 very aware that I have no rights, so I'm going to stick with
9 good cop right now," so you don't tell him, "Yes, you do
13:12:34 10 have rights, these are your rights"?

11 THE WITNESS: I followed that comment with
12 advising him of his rights. That was my intention, was to
13 let him know that he does have rights.

14 THE COURT: Where did you come up with the
13:12:49 15 idea that the judge will appoint counsel for him?

16 THE WITNESS: Well --

17 THE COURT: I've never appointed counsel for
18 anybody who's being interrogated. I've been on this bench
19 for almost 30 years and nobody has come to me and said, "We
13:13:03 20 tried to interview the suspect and we want a lawyer. Will
21 you please appoint a lawyer?"

22 Have you heard that to happen?

23 THE WITNESS: No.

24 THE COURT: When you were in the interrogation
13:13:16 25 phase?

1 THE WITNESS: No.

2 THE COURT: Why do you tell him that?

3 THE WITNESS: Our interview would have

4 terminated at the point he said he wanted an attorney,

13:13:23 5 couldn't afford one. At that point, my -- what I was trying

6 to relay to him was that if he can't afford one, because he

7 wasn't asking, "Where can I get an attorney from," he was

8 asking, "If I can't afford one, where would I get one?" At

9 that point, the next phase of getting an attorney would be a

13:13:39 10 judge would appoint one for him.

11 THE COURT: Have you ever heard of counsel

12 being appointed for somebody who's being interrogated? I've

13 never heard that to happen. During an investigative stage

14 of the case, when have you ever asked a judge to appoint

13:13:55 15 counsel for somebody so you can continue with the

16 interrogation?

17 THE WITNESS: My understanding of his question

18 was not where would he get an attorney before he gets

19 interrogated. My understanding of his question was when he

13:14:08 20 gets to that point, where would he get an attorney if he

21 can't afford one.

22 THE COURT: Any more cross-examination?

23 MR. PYLE: Thank you, Your Honor. No.

24 THE COURT: Any more redirect?

13:14:18 25 MR. HERDMAN: No.

1 THE COURT: Does that complete your testimony?

2 MR. HERDMAN: It does, Your Honor.

3 THE COURT: You may step down. Thank you. Do
4 you wish to put on any testimony?

13:14:27 5 MR. PYLE: We call Brandon Baxter for a
6 limited purpose of this hearing on this motion.

7 THE COURT: Very well. Thank you.

8 BRANDON BAXTER

9 of lawful age, the defendant herein, being first duly sworn,
13:15:00 10 was examined and testified as follows:

11 DIRECT EXAMINATION OF BRANDON BAXTER

12 BY MR. PYLE:

13 Q. Like every other witness, you've got to start by
14 telling us your full name and spell it.

13:15:14 15 A. Brandon Baxter, B-R-A-N-D-O-N, B-A-X-T-E-R.

16 Q. How old are you now?

17 A. Right now I am 20 years old.

18 Q. What's your birth date?

19 A. 4-27-92, April.

13:15:27 20 Q. So as of April 30, you had just turned 20 three days
21 earlier?

22 A. Correct.

23 Q. I want to invite your attention to the time of your
24 arrest on April 30. Are you with me?

13:15:44 25 A. Uh-huh.

1 **Q.** Tell us the circumstances of your arrest.

2 **A.** The group, along with the provocateur, we were inside
3 of Applebee's. We had had a meal there.

4 THE COURT: Did you know him as the
13:16:02 5 provocateur?

6 THE WITNESS: That is how I view him.

7 THE COURT: Did you know him at the time to
8 be?

9 THE WITNESS: No.

13:16:11 10 THE COURT: Why don't you give us his name at
11 the time. Provocateur, that's your lawyer's word.

12 THE WITNESS: Is it okay for me to use his
13 name? Okay.

14 THE COURT: Yes.

13:16:21 15 THE WITNESS: All right with the government?

16 THE COURT: Don't worry about the government.
17 I said you could use the name.

18 THE WITNESS: Shaquille was there. He paid
19 for the majority of the meal. He informed me that he didn't
13:16:37 20 have enough to cover it, so I chipped in, I think, 5 or \$10
21 for the meal. He had purchased me a tallboy, which is a
22 large beverage, alcoholic beverage, I believe, of the brand
23 Yuengling, a glass about yea tall. And I had finished
24 another one of my codefendant's who didn't want to finish
13:17:09 25 theirs.

1 As we left the restaurant, we entered into an
2 SUV. I was in the very back seat. There were two front
3 seats, middle row and then there was a second row in the
4 back. I was in the very back.

13:17:27 5 And as we were pulling out of the parking lot,
6 we were surrounded by federal agents, local law enforcement.
7 This is according to the affidavit that were --

8 **Q.** Well, what did you see?

9 **A.** What I saw first were about two SUVs right in front,
13:17:52 10 two more on each side coming in with spot beams, like bright
11 blue lights and spot beams. There were officers -- keep in
12 mind, these are paramilitary officers. They're all in head
13 to toe bulletproof vests. There was a Shepherd, German
14 Shepherd, and they were making -- the officers were making
13:18:23 15 weird noises. (A noise made by witness.) I think that was
16 a command to make the dog bark and act vicious.

17 There was what appeared to be a tank. And from what I
18 thought was -- I really do believe to be some sort of a tank
19 or military APC style, and that was carrying what I later
13:18:49 20 found out to be FBI SWAT.

21 At the time they -- they appeared to be very militant.
22 They were in olive green uniforms. The leader had a P90
23 submachine gun, which to my knowledge has a 50-round
24 magazine, and all the federal agents that surrounded us,
13:19:14 25 which appeared to be somewhere between 75 -- 50 or 75

1 agents, all of which were carrying, I believe, M16 assault
2 rifles, they converged upon the vehicle.

3 They had a loud megaphone and they ordered -- they
4 ordered the driver to stop the vehicle and for everyone to
13:19:39 5 put their hands out of the window. At that point, the
6 informant ordered -- he didn't order. He told everyone in
7 the vehicle to act cool. "Act cool, guys, just play it
8 cool."

9 The agent on the megaphone then proceeded to order all
13:20:00 10 of us individually out of the vehicle. During this point,
11 it's pouring rain. It's pouring rain. It's coming down
12 hard. It was a torrential downpour. And we were ordered
13 down with our hands behind our heads and walk backwards
14 toward the FBI, and I'm the last one to be called out of the
13:20:29 15 vehicle.

16 I'm ordered to lay on my stomach with my -- just flat
17 on the ground in the soaking -- on the soaking wet pavement
18 and guns drawn on me. The scene was completely unreal.
19 I've never experienced anything like this in my life. I
13:20:53 20 mean, I have -- I've been arrested by the police before.
21 This was a completely different level.

22 Q. Okay. So you -- I'm going to try to get you focused
23 here, Brandon, if that's okay.

24 A. Okay.

13:21:06 25 Q. You were laying face down, wet ground. Eventually you

1 were ordered up. What happened then?

2 **A.** I was put into a sedan, unmarked federal agent's
3 vehicle, and I was taken to the FBI headquarters, downtown
4 Cleveland.

13:21:30 5 **Q.** What time of day or night were you arrested? What time
6 did you get off the ground?

7 **A.** I want to say approximately -- approximately 9:30 p.m.

8 **Q.** So they got you in the sedan, they drove you someplace.
9 Where did they drive you?

13:21:51 10 **A.** Drove me to the FBI headquarters in downtown Cleveland.

11 **Q.** Were you the only one of the group of the defendants in
12 that vehicle?

13 **A.** In that vehicle. They took us all to the same location
14 in separate vehicles.

13:22:02 15 **Q.** You got to the FBI office about what time; do you
16 remember?

17 **A.** I don't know. I was in a state of shock. I can
18 consider -- I would compare the way I felt to what I
19 understand posttraumatic stress disorder to be.

13:22:19 20 **Q.** What's that?

21 **A.** Well, posttraumatic stress. I mean, it's stress after
22 a very traumatizing situation. I felt that my life was
23 being endangered because I was surrounded by a large amount
24 of fully automatic assault rifles, and every officer to my
13:22:43 25 knowledge also carried a side arm. There were a lot of guns

1 there.

2 **Q.** Okay. So eventually you do get to the FBI office. Do
3 you get what they call booked? Do you get fingerprinted,
4 all that?

13:22:56 5 **A.** No. That came later. They started by -- they took us
6 into this large area. It felt like a parking garage. There
7 were a lot of vehicles in there. Some of them seemed
8 similar to the tank I saw earlier. And they put us in this
9 room they call the cage.

13:23:23 10 I have to catch myself for a moment.

11 This is the first time I've ever experienced anything
12 like this in my life. This room they call the cage -- I am
13 just emotional. I'm not --

14 THE COURT: Just take your time. Are you
13:23:53 15 ready for the next question?

16 THE WITNESS: Yes.

17 BY MR. PYLE:

18 **Q.** Okay. You're in this room. It looks like a cage,
19 right, there were bars?

13:23:59 20 **A.** Yeah. They put us all in separate corners in the room,
21 just facing into the corner. I sat there for well over an
22 hour, soaking wet, not knowing what was going to happen.

23 **Q.** Did anyone talk to you or did you talk to anybody
24 during that next hour?

13:24:30 25 **A.** No.

1 Q. What is the next thing that happened?

2 A. They proceeded to take us all individually away. I
3 didn't know what was happening. They took us up to the room
4 where the FBI began to do what they call an interview, but I
13:24:51 5 know very well it's an interrogation.

6 Q. Had you been fingerprinted or photographed before you
7 got into the room?

8 A. No.

9 Q. Go ahead.

13:25:03 10 A. From there -- where did I leave off?

11 Q. They brought you into the room.

12 A. As you can tell by the video, I am -- I'm in some -- I
13 am dazed and I am confused, I am nervous, I'm terrified.
14 And I felt very intimidated, and I felt if I didn't tell
13:25:40 15 them what they wanted to hear, that I didn't know what was
16 going to happen.

17 Q. They gave you coffee, though?

18 A. Right.

19 Q. They let you go to the bathroom?

13:25:49 20 A. Yeah.

21 Q. You heard Agent Molina talk about telling you about
22 what they had on you and the seriousness. Were you
23 listening to them?

24 A. Yes.

13:26:02 25 Q. After hearing him talk about the seriousness and the

1 taking what you said to the U.S. Attorney's Office, what
2 were you feeling then?

3 **A.** I felt like they -- it was like they were giving me an
4 offer, "If you talk to us, things will not be as bad as they
13:26:31 5 could be if you don't."

6 **Q.** You heard Agent Molina talk about the advice of rights
7 form, right?

8 **A.** Uh-huh.

9 **Q.** Before he gave you that form, you said something about
13:26:46 10 "I know I don't have any rights"?

11 **A.** Correct.

12 **Q.** Why did you say that?

13 **A.** Because I had knowledge of what you had mentioned
14 earlier in the cross-examination of the NDAA, National
13:27:01 15 Defense Authorization Act. To my knowledge, it was signed
16 in by President Obama on the New Year's of this year, and
17 there was a clause that's been called the indefinite
18 detention clause, which gave the military of the United
19 States the right to indefinitely detain any U.S. citizen
13:27:31 20 without reading them their rights, that it more or less gave
21 the military the ability to make anybody just disappear.
22 They didn't have to announce it. They didn't have to have a
23 warrant. They could just make you go away.

24 **Q.** You actually sat down and read that piece of
13:27:57 25 legislation?

1 **A.** I read parts of it, not the whole thing. This part of
2 the clause itself, the act itself is a very lengthy
3 document. It goes into larger details on the whole military
4 defense of the country, but this is a clause.

13:28:19 5 **Q.** Why didn't you ask the agent, "Gee, am I covered by the
6 National Defense Authorization Act," or words to that
7 effect?

8 Why didn't you just ask him about, "Am I being held
9 pursuant to that law?"

13:28:34 10 **A.** I was afraid. I don't want to bring that up. I mean,
11 I was --

12 **Q.** Okay. After you say, "I don't have any rights," then
13 he gives you the form, right, with the rights on it?

14 **A.** Right.

13:28:49 15 **Q.** What did you think when you were reading that form?

16 **A.** The form right here?

17 **Q.** Yes. If it's not, I can show you a copy of it.

18 The form that advises you that you have a right to
19 remain silent, et cetera.

13:29:21 20 **A.** I remember I did read this, and I asked about the
21 lawyer. I asked where would it be appointed from, and then
22 the interrogating agent at that point just told me where he
23 thought I could get a lawyer and kind of jumped on to,
24 "Well, we need to talk. We need to talk."

13:29:47 25 I felt like I was being pressured to sign this paper,

1 if I didn't sign this paper and I didn't talk to these
2 people, that there were going to be grave repercussions. Of
3 what exactly, I was unaware; but I was afraid for my life at
4 this point.

13:30:05 5 Q. So I want to kind of summarize now.

6 THE COURT: I am sorry. I didn't get the
7 question.

8 MR. PYLE: I want to summarize.

9 THE COURT: Okay.

13:30:19 10 BY MR. PYLE:

11 Q. First of all, did you believe that you had the right to
12 say, "I'm not going to talk to you"?

13 A. No.

14 Q. What made you feel that way?

13:30:29 15 A. What made me feel that way was the way I was arrested.
16 It was like -- you ever seen a movie of when Nazis come and
17 take over a town? That's what I felt like. I mean, the
18 German Shepherd is on top. They didn't stop barking the
19 entire time. I just --

13:31:03 20 Q. Okay. There were the circumstances of your arrest,
21 right?

22 A. Uh-huh.

23 Q. What else?

24 A. Circumstances of my arrest, the fact that I was soaking
13:31:15 25 wet and I was held in a cage. And I -- I was under a lot of

1 stress. And I was under -- I was confused. I go from a
2 situation where everyone is bashing orders at me and
3 pointing guns at my face, they're telling me to "Get on the
4 ground," to "Hey, you want some coffee?"

13:31:44 5 Q. Had the alcohol worn off at that point?

6 A. Well, I mean, have you drank before, Mr. Pyle?

7 THE COURT: You don't get to question.

8 MR. PYLE: I take the Fifth Amendment anyway,
9 Judge. Go ahead.

13:32:06 10 THE WITNESS: I am sure we're well aware, your
11 buzz goes away. There's still some lingering effects. I
12 mean, the government's trying to say that --

13 BY MR. PYLE:

14 Q. We'll let the government speak for themselves, but
13:32:21 15 there's that drinking. When was the last time you used any
16 kind of illegal drug?

17 THE COURT: Illegal?

18 MR. PYLE: Illegal.

19 THE COURT: Illegal drugs?

13:32:32 20 MR. PYLE: Illegal.

21 THE COURT: I didn't hear you talk about
22 illegal drugs. I thought it was alcohol.

23 MR. PYLE: That night, yes.

24 THE WITNESS: On April 28, I had taken an
13:32:51 25 Adderall, which is a prescription medication for people who

1 have ADHD. For those of us who do not have ADHD, if we take
2 this prescription medication, it gives us the inability to
3 sleep. For the night of April 28, I had absolutely no
4 sleep, and I stayed up all night in the Occupy Cleveland
13:33:22 5 info booth, honestly hanging out with a bunch of homeless
6 people, one of which was an Iraqi vet with posttraumatic
7 stress disorder, and I tried to keep him stable for the
8 night.

9 BY MR. PYLE:

13:33:39 10 Q. So how much sleep had you had? When was the last time
11 you had gotten any sleep before your interrogation?

12 A. I believe I slept -- I believe I slept the night of
13 April 29, but Occupy Cleveland had occupied the Heart Fest
14 going on at that time. So I was up very late helping them
13:34:05 15 put supplies away because the city was not allowing us to
16 stay in Willard Park. They weren't allowing us to keep our
17 supplies in the park overnight. So I helped, I stayed at
18 the park later to help load a truck with all the supplies
19 that were in the park.

13:34:24 20 I did get sleep that night, but I -- I have a bad
21 memory. I am trying to recall. I did get sleep that night,
22 but I was woken up, I believe, the next day.

23 Q. Who gave you the Adderall?

24 A. That Adderall was given to me by a friend whom I'd like
13:35:03 25 to remain unnamed.

1 Adderall was something back when I was a few years
2 younger, I had an addiction to. And I had gotten over this
3 addiction at one point. While I was working for Mr. Azir,
4 he gave me a job fixing up his house. He had given me an
13:35:21 5 Adderall, and this was the first Adderall I had had in a
6 number of years, and it kick started back up my addiction.

7 Q. Okay.

8 MR. PYLE: Those are my questions. Thank you.

9 THE COURT: You may cross-examine.

13:35:44 10 MR. HERDMAN: Thank you, Your Honor.

11 CROSS-EXAMINATION OF BRANDON BAXTER

12 BY MR. HERDMAN:

13 Q. Good afternoon, Mr. Baxter. My name is Justin Herdman.
14 I'm an Assistant United States Attorney. I will be asking
13:35:52 15 you a few questions. My questions will call for a "yes" or
16 "no" response. If you don't understand something I say,
17 please let me know. Okay?

18 You described the circumstances of your arrest on April
19 30. You actually went into somewhat great detail during
13:36:09 20 your direct examination from Mr. Pyle?

21 A. Uh-huh.

22 Q. You remembered leaving Applebee's?

23 A. Yes.

24 Q. You remembered getting into the SUV?

13:36:19 25 A. Yes.

1 **Q.** You remembered --

2 THE COURT: I think you should say, "Do you?"
3 You're making a statement rather than asking him a question,
4 so ask a question.

13:36:30 5 MR. HERDMAN: Will do, Your Honor. Thank you.

6 BY MR. HERDMAN:

7 **Q.** Do you remember how everyone was arranged inside the
8 SUV?

9 THE COURT: The one he was in?

13:36:42 10 MR. HERDMAN: Yes, Your Honor.

11 THE COURT: State the question again.

12 BY MR. HERDMAN:

13 **Q.** Do you remember how everyone was arranged inside the
14 SUV?

13:36:53 15 THE COURT: Well, I still -- you mean the SUV
16 where he occupied? I thought he described more than one
17 SUV.

18 BY MR. HERDMAN:

19 **Q.** Did you leave Applebee's and get into an SUV?

13:37:07 20 **A.** Yes.

21 **Q.** Do you remember how everyone inside that SUV was
22 arranged?

23 **A.** Most of them.

24 **Q.** Who was driving?

13:37:15 25 **A.** Shaquille.

1 Q. Who was in the front passenger seat?

2 A. Mr. Wright.

3 Q. Where were you seated?

13:37:24

4 A. I was in the very back row. I don't remember which
5 side I was on.

6 Q. Who was seated in front of you?

7 A. In the front row, in the row in front of me, there was
8 Anthony and Connor Stevens.

9 Q. You don't know where Mr. Stafford was seated?

13:37:43

10 A. He was next to me; I don't remember which side.

11 Q. You remember pulling out of the Applebee's -- do you
12 remember pulling out of the Applebee's parking lot?

13 A. Yes.

14 Q. Do you remember where the vehicle actually stopped?

13:38:02

15 A. I wasn't paying attention which way we were driving.

16 Q. Do you remember when the vehicle stopped?

17 A. Yes.

18 Q. Do you remember what caused the vehicle to stop?

19 A. Yes.

13:38:12

20 Q. What caused the vehicle to stop?

21 A. Mr. Azir pulled on the brakes and there were a bunch of
22 SUVs that blocked our path along with all the agents that
23 seemed to appear out of nowhere.

24 Q. Was there any sort of audible indication that the car
13:38:31 25 should come to a stop? Was there some sort of noise?

1 **A.** The first thing I remember hearing -- a lot of my
2 memory from this is from going over the tapes provided by
3 the FBI. And the first thing I remember is a loud screech
4 from what sounds to be like a megaphone or a PA system.

13:38:55 5 **Q.** So you just said a lot of memory is based on the tapes
6 you've reviewed provided by the FBI; is that correct?

7 **A.** The vivid details, yes, of what happened when the FBI
8 pulled up upon us.

9 **Q.** If there's a detail like somebody carrying a P90
13:39:15 10 machine gun, submachine gun, is that based upon your review
11 of the FBI tapes?

12 **A.** No. I am speaking about the audio, the sounds of what
13 happened that night.

14 **Q.** How are you familiar with a P90 submachine gun?

13:39:29 15 **A.** I was raised in the era of video games. Have you ever
16 played -- I can't ask questions.

17 I am raised in the era of video games. Most everyone
18 in my generation has played a game where you play as a
19 soldier going to fight some war.

13:39:47 20 **Q.** What's the name of the game?

21 **A.** One I can think of, Modern Warfare.

22 **Q.** And Modern Warfare, that's a game that is also you
23 gained some familiarity with an M16 gun or rifle?

24 **A.** Yes.

13:40:00 25 **Q.** Which you also identified in your direct examination

1 you recognized?

2 **A.** Yes.

3 **Q.** Is that also a game that you were familiar with C-4
4 plastic explosive?

13:40:09 5 **A.** I believe C-4 is used in that game, yes.

6 **Q.** Because before that car stopped and before you were at
7 Applebee's on the night of April 30, Mr. Baxter, isn't it
8 true --

9 MR. PYLE: Objection, Your Honor. I know
13:40:25 10 where this is going. I think the court does, too. My
11 questions were limited to after the arrest leading up to --
12 this is -- this is intended to inquire about his knowledge
13 of explosives and weapons.

14 MR. HERDMAN: Judge, I believe I am entitled
13:40:39 15 to inquire as to the reasons why the law enforcement
16 response was such that it was. And those reasons go
17 directly to why Mr. Baxter was at that bridge on the night
18 of April 30.

19 THE COURT: Well, you can put testimony on
13:40:51 20 about that, but I am a little concerned about the
21 cross-examination going beyond the direct.

22 I believe when Mr. Pyle placed this defendant
23 on the stand, he limited his questions to the arrest and
24 what took place after the arrest. There's been no question
13:41:13 25 about his conduct prior to his arrest, and I think that's an

1 improper area to go into.

2 MR. HERDMAN: Your Honor, I can either
3 approach to ask the court if you -- how would you like me to
4 proceed here? There are some details I think I should be
13:41:29 5 entitled to inquire about. I'm happy to approach.

6 THE COURT: About prior to his arrest?

7 MR. HERDMAN: Yes, Your Honor. Specifically
8 his exposure to the elements, and he's testified about
9 events that occurred prior to his arrest. He's testified
13:41:43 10 about April 28 and 29 and his prior arrests, Your Honor.

11 THE COURT: You can go to his prior arrests,
12 but don't go to this event.

13 MR. HERDMAN: But he did reference his prior
14 arrests, and this particular arrest on April 30 was very
13:42:04 15 different than those prior experiences.

16 THE COURT: Well, so it was. I gather that
17 he's attempting to establish to my satisfaction that his
18 subsequent statement was involuntary. I think that's the
19 thrust of Mr. Pyle's questioning. That's a matter for me to
13:42:25 20 decide.

21 MR. HERDMAN: Your Honor, again, I'm happy to
22 approach on this, but I do think I would be entitled to
23 inquire as to why he was up so late, why he didn't get any
24 sleep the night before. I think there are reasons that I
13:42:39 25 should be allowed to inquire as to why it was that he didn't

1 get any sleep on the night of the 29th or limited sleep on
2 the night of the 29th.

3 And I am sorry, but that may impact -- that
4 may involve eliciting some responses here that Mr. Pyle is
13:42:55 5 not happy with.

6 THE COURT: Let's take it question by
7 question. If you have an objection, you make the objection
8 and I will rule on it.

9 BY MR. HERDMAN:

13:43:01 10 Q. Your testimony on direct examination by Mr. Pyle was
11 that when you got out of the car, you were asked to get
12 into -- you were asked to lay on the ground, correct?

13 A. Correct.

14 Q. There was a puddle there?

13:43:14 15 A. There was a puddle everywhere.

16 Q. It was raining?

17 A. Yes.

18 Q. It was raining?

19 THE COURT: This was at Applebee's?

13:43:19 20 MR. HERDMAN: Yes, Your Honor.

21 BY MR. HERDMAN:

22 Q. Just for clarification, the car stops some distance
23 away from Applebee's, correct?

24 A. Yes.

13:43:27 25 Q. Okay. And you were inside the car when it stopped?

1 **A.** Yes.

2 **Q.** Now, were you the first person to be asked to get out
3 of the car?

4 **A.** No.

13:43:34 5 **Q.** Were you the last person to be asked to get out of the
6 car?

7 **A.** Yes.

8 **Q.** That's because you were seated in the back row?

9 **A.** Yes.

13:43:41 10 **Q.** So who was the first person to get out of the car?

11 **A.** Mr. Azir.

12 **Q.** Who was the second person to get out of the car?

13 **A.** Mr. Wright.

14 **Q.** Who was the third person to get out of the car?

13:43:53 15 **A.** One of the two in the second row. It was either
16 Mr. Stevens or Mr. Hayne.

17 **Q.** Would I be correct in concluding that either Mr. Hayne
18 or Mr. Stevens was then the next person to get out of the
19 car?

13:44:07 20 **A.** Yeah.

21 **Q.** And the other person that was in the row -- and
22 Mr. Stafford got out of the car before you did?

23 **A.** Yeah.

24 **Q.** You were the last person out of the car?

13:44:13 25 **A.** Yes.

1 **Q.** Now, when the first person in the car got out of the
2 car, was that person taken immediately from the car to some
3 other location before the next person got out of the car?

4 Do you understand my question?

13:44:24 5 **A.** Yes.

6 **Q.** Was that person taken away before the next person got
7 out of the car?

8 **A.** Yes.

9 **Q.** Was that person put inside of another vehicle?

13:44:32 10 **A.** I believe that -- I believe I was laying on the
11 pavement next to somebody else that was arrested with me.

12 **Q.** So at least someone else had been out of the car at the
13 point in time you got out of the car and were put on the
14 ground?

13:44:50 15 **A.** Everyone was out of the SUV.

16 **Q.** Everyone?

17 **A.** Everyone was out of the SUV. I was the last one pulled
18 out.

19 **Q.** Just so I'm clear, when you got out of the SUV,
13:45:01 20 everyone else who was in the SUV was outside of the SUV
21 laying on the ground?

22 **A.** At least one other person was laying on the ground.
23 I'm not going to say all of them, because I'm not sure.

24 **Q.** Now, that night, April 30, it had been raining earlier
13:45:19 25 in that evening, correct?

1 **A.** Yes.

2 **Q.** In fact, you were outside on the evening of April 30?

3 **A.** Yes.

4 **Q.** And you were outside for an extended period of time,
13:45:28 5 longer than, say, 20 minutes you were outside?

6 THE COURT: You're talking about before the
7 arrest?

8 MR. HERDMAN: I'm talking about at the bridge.
9 I am just trying to be careful.

13:45:38 10 THE COURT: I don't think before the arrest is
11 a better way to ask it.

12 MR. HERDMAN: Let me see if I could narrow it
13 down, Your Honor.

14 BY MR. HERDMAN:

13:45:45 15 **Q.** Were you at a location prior to going to Applebee's to
16 eat dinner?

17 **A.** Yes.

18 **Q.** I'm not going to ask you to specify what location that
19 was at, but was that location outside?

13:45:55 20 **A.** Yes.

21 **Q.** And at that point in time that you were at that
22 location, were you by yourself?

23 **A.** No.

24 **Q.** You were there with how many other people?

13:46:03 25 **A.** Five.

1 **Q.** And when you were at this location with those other
2 people, was it raining at that point in time you were at the
3 location?

4 **A.** Yes.

13:46:13 5 **Q.** Was it raining heavily at the time you were at that
6 location?

7 **A.** Yes. I had a jacket.

8 **Q.** You had a jacket on?

9 **A.** Yes.

13:46:20 10 **Q.** And at some point, you left that location and you got
11 back into an SUV and you drove to Applebee's?

12 **A.** Yes.

13 **Q.** At the point in time you left the location to go to
14 Applebee's, when you got into the SUV, were you wet when you
15 got into the SUV?

13:46:38 16 **A.** Yes. I took my jacket off.

17 **Q.** Did you leave the jacket in the SUV when you got to
18 Applebee's?

19 **A.** Yes.

13:46:40 20 **Q.** So you had to walk through the parking lot to get to
21 Applebee's from the SUV?

22 **A.** Yes.

23 **Q.** Did you get wet when you walked from the SUV to
24 Applebee's?

13:46:50 25 **A.** Yes.

1 Q. Because it was raining?

2 A. Yes.

3 Q. So how long were you at Applebee's for?

4 A. I couldn't say precisely. I would hypothesize that it
13:47:16 5 was maybe half an hour to 45 minutes.

6 Q. And during that entire half an hour, 45 minutes, you
7 didn't have your coat on, correct?

8 A. Correct.

9 Q. And you were wet?

13:47:28 10 A. Uh-huh.

11 Q. You left Applebee's, you got into the SUV and you did
12 not put your coat on, right?

13 A. Correct.

14 Q. You left it there on the seat of the SUV?

13:47:36 15 A. Uh-huh.

16 Q. That's why you didn't have your coat when you were
17 asked to get out of the car when it was stopped?

18 A. Correct.

19 Q. So you are transported from this parking lot close to
13:47:52 20 Applebee's, you are transported to the Cleveland FBI?

21 A. Correct.

22 Q. And do you remember who transported you there?

23 A. No.

24 Q. Did you have any conversation with this -- these people
13:48:05 25 when you were transported? Did you talk at all?

1 **A.** In the vehicle, I don't remember saying a word.

2 **Q.** Did you complain about anything?

3 **A.** No, I just kind of stared out the window and watched my
4 life fly before my eyes.

13:48:19 5 **Q.** You state "out the window." So you were able to see
6 out the window?

7 **A.** Yes.

8 **Q.** Nobody put a hood over your head when they put you in
9 that car?

13:48:24 10 **A.** No.

11 **Q.** Nobody put a blindfold on you when they put you in the
12 car?

13 **A.** No.

14 **Q.** You were able to look out the window and see where
13:48:30 15 you're going?

16 **A.** Yes.

17 **Q.** And when you arrived at the FBI, you said that you were
18 placed in something called the cage. What is the cage? Is
19 it a room?

13:48:39 20 **A.** Now that I -- I'm a little more calm, I can -- that was
21 within the parking garage-like structure, and I believe it
22 was literally a cage. I don't remember -- I don't remember
23 if there was a door or not, but it was literally like a big
24 cage, probably about this size -- from here to about there,
13:49:08 25 this whole wooden panel thing.

1 THE COURT: About 15 feet one way?

2 THE WITNESS: Yes. And it was -- I don't

3 remember if it was chain link or if it was thicker gauge

4 wire. But we were locked in there and there were federal

13:49:28 5 agents. I think there was about one appointed to like stand

6 by each of us and a number of which stood by the entrance to

7 the cage.

8 BY MR. HERDMAN:

9 Q. But this enclosure you've talked about, you've called

13:49:46 10 the cage, it's actually inside of an enclosed parking lot,

11 right?

12 A. Not enclosed, no.

13 Q. The parking lot is not enclosed, the parking lot is

14 open to the elements?

13:49:56 15 A. It felt like -- felt like that way to me. It felt like

16 I was in a parking garage with like open walls.

17 Q. Could you see outside? Could you see outside from

18 where you were sitting in the cage?

19 A. No. I was told to point my face towards a corner.

13:50:13 20 Q. Could you hear the rain falling while you were sitting

21 in that cage?

22 A. I wasn't paying attention.

23 Q. But you said that there were federal agents that were

24 walking around in that area that you were in?

13:50:24 25 A. Yeah. They kind of stood by you, and there was some

1 moving around.

2 Q. How many agents were down there?

3 A. Quite a few; quite a few.

4 Q. At some point in time you were asked to leave that area

13:50:44 5 and go upstairs where you're placed into a room with Special
6 Agent Molina, who you've already seen testify?

7 A. Correct.

8 Q. There was someone else in the room with him, correct?

9 A. Correct.

13:50:57 10 Q. Who was that; do you remember?

11 A. No.

12 MR. HERDMAN: I'm going to ask Agent Stark to
13 stand up, Your Honor, who's seated in the galley.

14 BY MR. HERDMAN:

13:51:05 15 Q. Do you recognize this individual?

16 A. Yes.

17 Q. Who is that?

18 A. That is the other agent who was involved in my
19 interrogation.

13:51:12 20 Q. So you sat in that room with Special Agent Dan Molina,
21 who we heard testify, and Special Agent Michael Stark,
22 correct?

23 A. Correct.

24 Q. And during the entire time that you talked to both
13:51:25 25 Agent Molina and Agent Stark, they never pulled a gun out,

1 did they?

2 **A.** No.

3 **Q.** They never pointed a weapon at you?

4 **A.** No.

13:51:35 5 **Q.** They never yelled at you?

6 **A.** No.

7 **Q.** In fact, I know you've listened to this video that I
8 played. You've heard this before?

9 **A.** Correct.

13:51:43 10 **Q.** Throughout the course of that entire interview, they
11 never even raised their voice with you, do they?

12 **A.** No.

13 **Q.** In fact, what they did was they asked you if you needed
14 anything, correct? Didn't they ask you if you needed
13:52:00 15 anything at the very beginning of your discussion with them?

16 **A.** Yes. I asked them for a change of clothes, which they
17 did not provide.

18 **Q.** Okay.

19 MR. HERDMAN: Your Honor, may I approach the
13:52:12 20 witness?

21 THE COURT: Yes.

22 MR. HERDMAN: I am showing him, for the
23 record, a transcript which has been previously --

24 THE COURT: Let's take the cuffs off so he's
13:52:29 25 got a better chance to work with that.

1 BY MR. HERDMAN:

2 Q. Mr. Baxter, if I could turn your attention to page 1 of
3 that transcript.

4 A. Yes.

13:53:15 5 Q. And do you recognize this transcript? You've seen
6 this, correct?

7 A. Yes.

8 Q. Seen this -- maybe not this particular copy?

9 A. Well, the version of the tape we have has quite a few
13:53:33 10 instances where there's a loud screeching and staticky noise
11 where portions of the tape are cut out.

12 Q. I think we've covered that with the court.

13 A. I just want to add that I don't believe those parts
14 that are cut out of the tape are in our transcripts.

13:53:52 15 Q. Okay. So have you -- I guess my question is, have you
16 seen this particular transcript that's in front of you
17 before? This is a government transcript. Have you seen
18 this?

19 A. When I was sitting over there.

13:54:01 20 Q. Okay. So prior to your testimony right now --

21 THE COURT: Let's be sure we know for the
22 record. Is the -- is this a government's exhibit?

23 MR. HERDMAN: I was going to mark the entire
24 transcript at the conclusion, but maybe --

13:54:12 25 THE COURT: Let's mark it now.

1 MR. HERDMAN: I will mark the subset of the
2 transcript. That will be Government's Motion Exhibit 3.
3 And then I will mark the entire transcript and I will give
4 it to Mr. Pyle. If there's no objection, then I will offer
13:54:26 5 both of those.

6 THE COURT: Well, I want to be sure that the
7 exhibit that you're now marking, that this witness has a
8 copy of that exhibit.

9 MR. HERDMAN: Yes, Your Honor. That would be
13:54:39 10 Government's Exhibit 3. I will confirm at the conclusion of
11 this his testimony that that is, in fact, Government's
12 Exhibit 3 with Mr. Pyle. I made copies of the exhibits,
13 so --

14 THE COURT: But you're asking now about
13:54:50 15 Government's Exhibit 3?

16 MR. HERDMAN: Yes, I am, Your Honor.

17 THE COURT: Do you want to direct him to a
18 certain page?

19 MR. HERDMAN: I do.

13:54:56 20 BY MR. HERDMAN:

21 Q. Page 2, Mr. Baxter, if you would go up to the top
22 there. And I think it starts on page 1 but goes over to
23 page 2. Agent Molina says, "Why don't you have a seat. You
24 want a cup of coffee or somethin'?"

13:55:10 25 Do you see that?

1 **A.** Yes.

2 **Q.** And your response is, "Something warm, whatever."

3 And then Agent Molina says, "Warm coffee would be
4 good?"

13:55:18 5 Do you see that part?

6 **A.** Yes.

7 **Q.** And you would agree with me this is within -- certainly
8 within a minute of you getting into that room you were asked
9 this question, "You want a cup of coffee or somethin'?"

13:55:32 10 **A.** Uh-huh.

11 **Q.** That's pretty much right at the start of your
12 interview; you would agree with me on that?

13 **A.** Yes.

14 **Q.** And, in fact, they do bring you a cup of coffee; isn't
13:55:43 15 that true?

16 **A.** Yes.

17 **Q.** If you could go to page 3, please.

18 Are you there?

19 **A.** Yes.

13:55:56 20 **Q.** At the bottom of page 3, where it says, "Molina: My
21 name is Dan Molina."

22 **A.** Uh-huh.

23 **Q.** At the end of that paragraph, he says, "I want you to
24 have some coffee, try to warm up a little bit before we do
13:56:12 25 that. Okay?"

1 And your response is, "Think I could use the bathroom,
2 too?"

3 Do you see that?

4 **A.** Yes.

13:56:18 5 **Q.** So, again, you were asked if you wanted to warm up a
6 little bit and you asked, "Can I go to the bathroom," and
7 the agents took you to the bathroom; isn't that true?

8 **A.** Yes.

9 **Q.** As soon as you came into the interview room, they
13:56:32 10 removed your handcuffs, true?

11 **A.** Yeah.

12 **Q.** Okay. And they had to put the handcuffs back on to
13 take you to go to the restroom?

14 **A.** Yes.

13:56:41 15 **Q.** But this time they handcuffed you in the front?

16 **A.** Yes.

17 **Q.** So no one had to watch you when you went to the
18 bathroom, so you could go yourself?

19 **A.** Yes.

13:56:49 20 **Q.** And which agent took you to the bathroom?

21 **A.** You said his name was Stark.

22 **Q.** This gentleman in the galley, Agent Stark?

23 **A.** Yes.

24 **Q.** Did you talk to Agent Stark at all when you went to the
13:57:01 25 bathroom?

1 **A.** I think I asked him how old he was.

2 **Q.** Do you remember what he said?

3 **A.** No.

4 **Q.** Why did you ask him how old he was?

13:57:09 5 **A.** Because he looks young.

6 **Q.** Looks young, doesn't he?

7 **A.** Yeah.

8 **Q.** But you didn't hear what he said?

9 **A.** No.

13:57:18 10 **Q.** Did he say -- he didn't say he was 17 or 20 or anything
11 like that, did he?

12 **A.** I don't think so and could work for the FBI.

13 **Q.** Okay.

14 MR. HERDMAN: We may have to put something on
13:57:30 15 the record to that effect, Your Honor, if it's necessary.

16 THE COURT: Put what on the record?

17 MR. HERDMAN: The age of Agent Stark.

18 THE COURT: If he wants to testify, do that.

19 BY MR. HERDMAN:

13:57:42 20 **Q.** Okay. So you came back from the bathroom and then,
21 once again, your handcuffs are taken off, correct?

22 **A.** Can you repeat that?

23 **Q.** When you came back from the bathroom, once again, your
24 handcuffs were taken off?

13:57:52 25 **A.** Yes.

1 Q. And then at that point in time, you were allowed to
2 drink your coffee?

3 A. Yes.

4 Q. And would you agree with me that you started to warm up
13:58:02 5 at that point in time?

6 A. I would say that in the video, I see myself still
7 shaking at that point.

8 Q. Were you more warm when you started drinking the coffee
9 after you came back from the bathroom than you were when you
13:58:27 10 were first brought in?

11 A. I was warmer but not dryer.

12 Q. Okay. You would agree with me, if you were shivering
13 at all, you were shivering less than you were when you were
14 first brought into the interview room?

13:58:36 15 A. Yes, because I had some time to warm up.

16 Q. And then Agent Molina explains to you why you've been
17 arrested; isn't that right? This is page 5. Page 5, page
18 6. Doesn't he explain to you what the charges are that
19 you've been arrested for? He tells you there's been a
13:59:01 20 conspiracy. Doesn't he tell you that?

21 A. Is that on page 5?

22 Q. Page 5 into page 6.

23 A. Yes, uh-huh.

24 Q. And at this point in time, he -- you would agree with
13:59:21 25 me he has not asked you any questions about what happened on

1 the night of April 30? This is page 5 of the transcript.

2 **A.** On page 6 he's asking me, "So we kinda know quite a
3 bit."

4 **Q.** That wasn't my question. I asked you, he hasn't asked
14:00:07 5 you any questions about what happened on the night of April
6 30; isn't that true?

7 **A.** It seems that he's only making statements.

8 **Q.** He didn't ask you if you were at the bridge prior to
9 stating this to you, did he?

14:00:21 10 **A.** Come again?

11 **Q.** Prior to stating this, the statement that's on pages 5
12 and 6 of the transcript, he didn't ask you if you were at
13 the bridge?

14 **A.** It doesn't look like it, no.

14:00:34 15 **Q.** Well, did he?

16 **A.** I'm looking at your transcript.

17 **Q.** The answer to the question is --

18 THE COURT: Wait a minute. This is two pages
19 now. I think he's got the opportunity to read it carefully
14:00:43 20 before he responds to your question.

21 Would you repeat the question, please?

22 MR. HERDMAN: Your Honor, the question is
23 prior to the portions of the transcript where Mr. Molina is
24 talking -- Agent Molina is talking, pages 5 and 6 of the
14:00:57 25 transcript, did he ask Mr. Baxter if he was at the bridge

1 that night. And Mr. Baxter's answer was, "It doesn't appear
2 that he did." And I would like to seek some clarification
3 on that.

4 THE WITNESS: He has not asked me if I was at
14:01:19 5 the bridge.

6 MR. HERDMAN: I am prepared to take that
7 answer if the court is willing.

8 THE COURT: Next question.

9 BY MR. HERDMAN:

14:01:28 10 Q. And prior to Mr. Molina's statements on pages 5 and 6
11 of the transcript, he didn't even ask you who you were with
12 that night, did he?

13 A. No.

14 Q. In fact, what he was asking you was if you were
14:01:55 15 comfortable. If he asked you a question, Mr. Baxter, it was
16 regarding your comfort; isn't that correct?

17 THE COURT: He asked the question, "Do you
18 understand that?" Isn't that a question? I don't
19 understand your question.

14:02:21 20 THE WITNESS: There seems to be a lot more
21 questions regarding things other than my comfort.

22 BY MR. HERDMAN:

23 Q. Did he ask you about your comfort prior to pages 5 and
24 6 of the transcript?

14:02:30 25 THE COURT: Before 5 and 6?

1 MR. HERDMAN: Before 5 and 6, Your Honor,
2 before the statement by Agent Molina.

3 BY MR. HERDMAN:

4 Q. Didn't he ask you if you wanted anything?

14:02:48 5 A. Yes.

6 Q. Didn't he ask you if you wanted some coffee?

7 A. Yes.

8 Q. Didn't he ask you if you needed anything else?

9 A. Yes.

14:02:51 10 Q. You told him you needed to go to the bathroom?

11 A. Yes.

12 Q. But he didn't ask you anything about why you had been
13 arrested on April 30 prior to page 5 of the transcript,
14 pages 5 and 6 of the transcript?

14:03:01 15 A. Correct.

16 Q. Thank you.

17 Now, do you still have Government's Motion Exhibit
18 Number 1 up there with you, Mr. Baxter?

19 A. Yes, I do.

14:03:16 20 Q. Do you remember seeing that on the night of -- I guess
21 it was the morning of May 1, 2012?

22 A. Yes.

23 Q. You signed that piece of paper, right?

24 A. Yes.

14:03:24 25 Q. And you actually read each line of the advice of rights

1 form?

2 **A.** Yes.

3 **Q.** And you understood each line of the advice of rights
4 form?

14:03:32 5 **A.** Yes.

6 **Q.** And at the conclusion where it asked if you want to
7 speak without an attorney present, you said yes.

8 **A.** It does not say that. It says, "You have the right to
9 have a lawyer with you during questioning." And then --

14:03:46 10 THE COURT: Let's do this by line by line.

11 MR. HERDMAN: Your Honor, I am happy to do
12 that.

13 THE COURT: Where are you?

14 MR. HERDMAN: This is Government's Motion
14:03:54 15 Exhibit 1. It's the advice of rights form.

16 THE COURT: Somebody got a copy for me,
17 please?

18 MR. HERDMAN: Here you go.

19 THE COURT: Thank you.

14:04:24 20 BY MR. HERDMAN:

21 **Q.** Okay. Mr. Baxter, could you please read the top line
22 of that form, the first line you were asked to read, to
23 yourself?

24 **A.** Read it out loud?

14:04:36 25 **Q.** Please.

1 **A.** "Before we ask you any questions, you must understand
2 your rights."

3 **Q.** Did you read that line? Did you read that line on the
4 morning of May 1?

14:04:46 5 **A.** Yes.

6 **Q.** I didn't mean right now.

7 **A.** Yes.

8 **Q.** On the morning of May 1, did you understand that line?

9 **A.** Yes.

14:04:52 10 **Q.** What was the next line you read on the morning of May
11 1?

12 **A.** "You have the right to remain silent."

13 **Q.** You read that line on the morning of May 1?

14 **A.** Yes.

14:05:01 15 **Q.** You understood that line on the morning of May 1?

16 **A.** I read it and understood all of this. I just didn't
17 believe it.

18 **Q.** We will get to that in a second. We are going to go
19 line by line. I want just to confirm that you read each

14:05:14 20 line and you understood it. What was the next line you read
21 on the form?

22 **A.** "Anything you say can be used against you in court."

23 **Q.** Okay. You read that on the morning of May 1?

24 **A.** Yes.

14:05:23 25 **Q.** To yourself?

1 **A.** Yes.

2 **Q.** You understood that line on the morning of May 1?

3 **A.** I would say I understood it in the context that these
4 are the rights that you're telling me that I have, but,
14:05:47 5 again, I didn't understand that I would be getting into a
6 situation where I'd be sitting here right now.

7 I feel that if I understood that more clearly, I
8 wouldn't have said a word to you.

9 **Q.** Mr. Baxter, you read that line on the morning of May 1,
14:06:06 10 that you had the right to remain silent?

11 **A.** Yes.

12 **Q.** You understood the English words, "You have the right
13 to remain silent," right?

14 **A.** Yes.

14:06:14 15 **Q.** You understood that meant you didn't have to say
16 anything, correct?

17 **A.** Yes, but I understood the English, but I was
18 disoriented from the experiences that I had gone through
19 earlier that night.

14:06:26 20 **Q.** And you didn't ask any questions about that particular
21 line to Agent Molina, did you, on the morning of May 1?

22 **A.** No.

23 **Q.** You didn't ask for a follow-up explanation or any
24 follow-up questions?

14:06:36 25 **A.** No.

1 **Q.** In fact, you read to the next line, which was what?
2 What was the next line that you read on the morning of May
3 1?

4 **A.** "You have the right to talk to a lawyer for advice
14:06:45 5 before we ask you any questions."

6 **Q.** So you read that line on the morning of May 1?

7 **A.** Yes.

8 **Q.** You understood that line on the morning of May 1?

9 **A.** Yes.

14:06:52 10 **Q.** You didn't ask any questions about that line on the
11 morning of May 1?

12 **A.** No, I did not.

13 **Q.** You moved to the next line. You read the next line to
14 yourself on the morning of May 1. What was that line?

14:07:13 15 Please read it out loud.

16 **A.** "You have the right to have a lawyer with you during
17 questioning."

18 **Q.** Okay. And you understood that line on the morning of
19 May 1?

14:07:21 20 **A.** Yes.

21 **Q.** You didn't ask any questions about that line on May 1?

22 **A.** No.

23 **Q.** You moved to the next line on May 1 and you read --

24 **A.** I read part of it aloud.

14:07:32 25 **Q.** Please read aloud the next line.

1 **A.** "If you cannot afford an attorney, one will be
2 appointed for you before any questioning if you wish."

3 **Q.** It's at this point you read, "Cannot afford a lawyer,"
4 you read that out loud, correct?

14:07:47 5 **A.** Yes.

6 **Q.** And you asked a question of Agent Molina?

7 **A.** Yes.

8 **Q.** What was that question?

9 **A.** "Where would" -- I believe something along the line of,
14:07:59 10 "Where would a lawyer be appointed from?"

11 **Q.** And Agent Molina's response included the word "judge,"
12 didn't it?

13 **A.** Yes.

14 **Q.** You heard the word "judge"? You heard him say "judge"?

14:08:13 15 **A.** Yes.

16 **Q.** And you affirmed, actually, visually, I think you can
17 see on the video, you affirmed with a nod that you had heard
18 Agent Molina's response?

19 **A.** I believe so.

14:08:24 20 **Q.** You went back down to the form and you looked at the
21 form, and I think you nodded, didn't you?

22 **A.** I believe so.

23 **Q.** Then you moved to the next line. You didn't ask any
24 additional questions of Agent Molina at that time.

14:08:40 25 You read the next line on the form, which was what?

1 **A.** "If you decide to answer questions now without a lawyer
2 present, you have the right to stop answering at any time."

3 **Q.** And you understood that line on the morning of May 1?

4 **A.** I actually don't really remember reading this one. I
14:09:03 5 remember reading the last one, and then -- I don't remember
6 reading this last one here.

7 **Q.** Okay. You didn't ask any questions of that one, did
8 you?

9 **A.** No, I didn't.

14:09:15 10 **Q.** And you moved to the next line. You did, in fact, read
11 it, because you signed it, right?

12 **A.** Yes.

13 **Q.** Okay. And what line was that?

14 **A.** "I have read this statement of my rights and I
14:09:29 15 understand what my rights are. At this time, I am willing
16 to answer questions without a lawyer present."

17 **Q.** Okay. So you acknowledged that you had read that line
18 and you had read the rest of the statement with a signature,
19 correct?

14:09:40 20 **A.** I signed your paper.

21 **Q.** You signed your paper, didn't you, Mr. Baxter? That's
22 got your name on it, right?

23 **A.** I signed a paper that I felt that I was obligated to
24 sign because I was in the custody of the federal agency that
14:09:56 25 had my life on the line.

1 **Q.** Well, let's talk a little bit about this National
2 Defense Authorization Act that you have indicated that you
3 had some knowledge of. You said that this National Defense
4 Authorization Act was signed by President Obama. When was
14:10:12 5 it signed by President Obama?

6 **A.** I believe on New Year's of this year.

7 **Q.** And I noticed in your direct testimony when you were
8 describing this law, you were -- you said that it relates to
9 U.S. citizens who are arrested, but you didn't say what they
14:10:31 10 were arrested for?

11 **A.** Correct.

12 **Q.** And isn't there a particular type of crime to which the
13 National Defense Authorization Act would apply?

14 **A.** I believe it says along the lines that more -- to my
14:10:53 15 understanding, National Defense Authorization Act means that
16 the military had the right to detain anybody for any reason
17 at any time, for any reason.

18 **Q.** For any reason, not for people who were arrested of
19 terrorism crimes?

14:11:06 20 **A.** To my understanding, it was for people who -- for any
21 reason, and that reason did not have to be disclosed. So
22 that leaves -- that leaves room for open -- that leaves open
23 room.

24 **Q.** Mr. Baxter, you've read the law, right? You testified
14:11:22 25 you've read the law?

1 **A.** I've read part of a clause.

2 **Q.** So you haven't read the entire law?

3 **A.** The entire law is an act, which I stated is a very long
4 act, which I haven't read all of.

14:11:34 5 **Q.** Okay. I thought your testimony was you read the entire
6 law. I may be mistaken, but that's what I thought your
7 testimony was.

8 **A.** My testimony was that I had read a clause.

9 **Q.** And that clause relates to individuals who are
14:11:47 10 suspected of committing terrorist acts; isn't that true?

11 **A.** I'm not aware of that.

12 **Q.** Okay. Are you aware of the case of the airliner that
13 was flying into Detroit where a young man had a bomb
14 strapped to his legs and tried to blow up that airliner?

14:12:04 15 Are you familiar with that?

16 **A.** No.

17 **Q.** You're not familiar with that case?

18 **A.** No.

19 **Q.** On Christmas Day 2009?

14:12:10 20 **A.** No.

21 **Q.** Are you familiar with the discussion that was going on
22 related to arrests in the United States of U.S. citizens
23 suspected of terrorism crimes and whether or not those
24 individuals should be afforded Miranda rights?

14:12:22 25 **A.** No. This act was of 2012, not 2009.

1 **Q.** And you would agree with me that an event that took
2 place in 2009, prior to the passage of the act, might have
3 informed why that law was passed in the first place; would
4 you agree with me on that one?

14:12:41 5 THE COURT: Well, I constantly caution lawyers
6 not to ask the witness "Would you agree with me?" I would
7 prefer you to say, "Is it true that," but not whether they
8 agree with you or not. That's not relevant.

9 MR. HERDMAN: Okay.

14:12:55 10 BY MR. HERDMAN:

11 **Q.** Mr. Baxter, is it true that a terrorist event that took
12 place in 2009 or 2010 or 2011 would have been relevant to
13 the passage of the National Defense Authorization Act on
14 December 31st, 2011?

14:13:11 15 **A.** I'm not aware of why it was put into effect.

16 **Q.** So you're very familiar with the law, according to the
17 testimony, but you're not familiar with why it was put in
18 place?

19 **A.** No.

14:13:23 20 **Q.** Did you think you had been arrested for a terrorist
21 act?

22 **A.** I thought -- I don't see how this falls under your
23 cross-examination.

24 **Q.** I don't think that's the question that was asked. I
14:13:43 25 asked, did you think you were arrested for a terrorist

1 attack?

2 MR. PYLE: Objection.

3 THE COURT: Sustained.

4 MR. HERDMAN: Your Honor, Mr. Pyle brought up

14:13:49 5 the act and the fact that the defendant apparently thought
6 he was not going to be afforded Miranda rights. I think I
7 should be allowed to ask if he thought that it would apply
8 to him.

9 THE COURT: Well, he's already advised of his
14:14:01 10 Miranda rights, I thought, as part of your case.

11 MR. HERDMAN: Well, that's certainly going to
12 be argument, Your Honor, but he's put on evidence here, and
13 I think I am entitled to test that evidence.

14 THE COURT: I'm not sure why it's relevant.

14:14:16 15 MR. HERDMAN: May I approach, Your Honor?

16 THE COURT: No. Let's keep going.

17 BY MR. HERDMAN:

18 Q. You testified that vehicles you thought were military
19 were present at the site of your arrest?

14:14:31 20 A. Correct.

21 Q. There were individuals with weapons, long weapons,
22 rifles that were present at the arrest?

23 A. Correct.

24 Q. There were individuals you called paramilitary present
14:14:40 25 at the arrest?

1 **A.** Yes.

2 **Q.** They were dressed in olive uniforms. There was some
3 body armor that was visible. That was your testimony?

4 **A.** Correct.

14:14:48 5 **Q.** So when you were taken to the FBI, you were still under
6 the belief that you were in the custody of the military?

7 **A.** No. I said that they looked like military. They
8 looked militant.

9 **Q.** You knew you were going to the FBI?

14:15:02 10 **A.** Yes.

11 **Q.** No one said they were taking you to the Department of
12 Defense facility?

13 **A.** No.

14 **Q.** No one said they were taking you to Guantanamo Bay?

14:15:11 15 **A.** No.

16 **Q.** No one put a hood on your head?

17 **A.** No.

18 **Q.** No one dressed you in an orange jumpsuit at that time
19 when you were being taken to the FBI?

14:15:19 20 **A.** No.

21 **Q.** You were told you were being taken to the FBI, and
22 that's, in fact, where you were taken?

23 **A.** Yes.

24 **Q.** When you were downstairs, you saw a number of federal
14:15:28 25 agents walking around, and those were FBI agents?

1 THE COURT: You're asking if he knew they were
2 FBI agents?

3 BY MR. HERDMAN:

4 Q. Did you know if they were FBI agents?

14:15:35 5 A. Yes.

6 Q. And when you went up to be interviewed, Agent Molina
7 identified himself as an FBI agent?

8 THE COURT: Well, that's a statement. I tried
9 to get you to ask questions, not make statements. For some
14:15:49 10 reason, I guess, in law school they now teach you you can
11 make an affirmative statement and the witness has to believe
12 it's a question.

13 MR. HERDMAN: Your Honor, I'll go on.

14 I will change it and I will go on --

14:16:00 15 THE COURT: I wish you would do it constantly
16 and not --

17 MR. HERDMAN: Corrupting influence of law
18 schools. I will be cautious of phrasing my questions.

19 THE COURT: Thank you.

14:16:10 20 MR. HERDMAN: I apologize.

21 BY MR. HERDMAN:

22 Q. Do you remember when you were brought into the
23 interview room, Special Agent Molina identified himself as
24 an agent of the FBI?

14:16:22 25 A. Yes.

1 **Q.** And did you have any question that Special Agent Stark
2 was a special agent of the FBI?

3 **A.** No.

4 **Q.** You knew he was an agent of the FBI, that Agent Stark
14:16:37 5 was an FBI agent?

6 THE COURT: That's an affirmative statement
7 again.

8 MR. HERDMAN: I'm sorry, Your Honor. I am
9 trying my best not to do it. It's awfully hard.

14:16:45 10 BY MR. HERDMAN:

11 **Q.** Do you remember if you believed that Agent Stark was an
12 FBI agent throughout your interaction with him?

13 **A.** Yes.

14 **Q.** So you did believe that he was an FBI agent?

14:17:00 15 **A.** Yes.

16 **Q.** In fact, everyone that you interacted with on the
17 evening of April 30 or May 1 was an FBI agent?

18 THE COURT: "Is it true that?"

19 BY MR. HERDMAN:

14:17:18 20 **Q.** Was everyone you interacted with on the evening of
21 April 30 and the morning of May 1 an FBI agent?

22 **A.** To my knowledge.

23 **Q.** You testified on direct examination regarding April 28.

24 THE COURT: That's a question?

14:17:36 25 BY MR. HERDMAN:

1 **Q.** You got no sleep on the night of April 28; is that
2 true?

3 **A.** Correct.

4 **Q.** So on the afternoon of April 29, you had had no sleep
14:17:51 5 since when? When was the first time prior to that that you
6 had sleep?

7 **A.** I believe on April 27.

8 **Q.** The night of April 27 was the last time you had slept?

9 **A.** Yeah.

14:18:04 10 **Q.** Okay. And what day of the week was that?

11 **A.** I don't know.

12 **Q.** Well, what day was April 30, do you remember that, what
13 day of the week?

14 **A.** No.

14:18:19 15 **Q.** Okay. I'll get back to that later, but April 27 was
16 the last night you got some sleep.

17 How many hours of sleep did you get on April 27?

18 **A.** I don't know; I don't keep track of that.

19 **Q.** You don't keep track of how many hours you sleep?

14:18:38 20 **A.** No.

21 **Q.** All right. But you know you didn't sleep on April 28,
22 the night of April 28?

23 **A.** Correct.

24 **Q.** And on April 29, isn't it true that there was a meeting
14:18:51 25 that was relevant to why you were arrested on April 30?

1 MR. HERDMAN: I'm not asking for details, Your
2 Honor.

3 BY MR. HERDMAN:

4 Q. I'm asking whether there was a meeting on April 29 that
14:18:58 5 was relevant to why you were arrested on April 30.

6 A. I don't have a copy of the sequence of events, but I
7 believe so.

8 MR. HERDMAN: Can I have just a moment, Your
9 Honor?

14:19:16 10 THE COURT: Yes.

11 BY MR. HERDMAN:

12 Q. Mr. Baxter, on the day before you were arrested, did
13 you have a meeting at a hotel room with some other
14 individuals?

14:19:47 15 A. Yes.

16 Q. And I'm not asking you what took place in that meeting.
17 But was that meeting in the afternoon of April 29?

18 A. I believe it was in the afternoon. It might have been
19 before 1:00. I'm not sure.

14:20:08 20 Q. But after that meeting, your testimony is that you
21 slept the night of April 29?

22 A. Yes.

23 THE COURT: It's a statement. Is it a
24 question or a statement?

14:20:22 25 BY MR. HERDMAN:

1 **Q.** Did you sleep the evening of April 29 following this
2 meeting at this hotel?

3 **A.** Yes.

4 **Q.** How many hours did you sleep for?

14:20:31 5 **A.** I already told you I don't keep track of how much I
6 sleep.

7 **Q.** Okay. You don't keep track of how much you sleep.

8 That's right. You don't remember how many hours you slept

9 on the night of April 29. You don't know when you woke up

14:20:42 10 on the morning of April 30?

11 **A.** No.

12 **Q.** Okay. And at this point in time, were you living in a
13 regular place? Did you have a regular address that you
14 called home?

14:20:54 15 **A.** I had a place where I stayed more often than I stayed
16 in other places, but I considered myself a -- a phrase I
17 would use, a couch surfer.

18 **Q.** I think you said that in your discussion with Agent
19 Molina you were a couch surfer.

14:21:21 20 The night of April 29th, do you know where you stayed?

21 **A.** Yes.

22 **Q.** Who did you stay with?

23 **A.** I stayed in a warehouse with a group of people that
24 were associated with Occupy Cleveland.

14:21:35 25 **Q.** And is that the same place -- was this warehouse the

1 same location where you slept the night of April 27?

2 **A.** I'm not aware. It's possible. I could have been
3 sleeping somewhere else.

14:22:01

4 **Q.** But you don't remember if you slept in that warehouse
5 on the night of April 27?

6 **A.** No.

7 **Q.** Mr. Baxter, what did you have on you when you were
8 arrested? What were you carrying?

9 **A.** I don't quite remember what I had on me at that time.

14:22:27

10 **Q.** Did you have a knife on you?

11 **A.** I usually carry a pocket knife, yes.

12 **Q.** How long was the blade on that knife?

13 **A.** Three to four inches, maybe, maybe two and a half.

14 **Q.** Was it a blade that swung out of a handle?

14:22:44

15 **A.** Yes.

16 **Q.** You could -- could you swing that blade out of the
17 handle with the thumb?

18 **A.** Yes.

19 **Q.** Would the blade lock into place after you swung it out?

14:22:54

20 **A.** Yes; it was a pocket knife.

21 **Q.** Did you carry that knife in your pocket?

22 **A.** Yes.

23 **Q.** Which pocket did you carry it in?

24 **A.** In my right pocket.

14:23:04

25 **Q.** Right front pocket or right back pocket?

1 **A.** Front.

2 MR. HERDMAN: Could I just have a moment, Your
3 Honor?

4 THE COURT: Yes.

14:23:23 5 MR. HERDMAN: Thank you. I appreciate it.

6 BY MR. HERDMAN:

7 **Q.** One last question, Mr. Baxter. With respect to this
8 couch surfing, how long have you been doing that? I'm
9 sorry. I will let you take a drink. I didn't know you were
14:24:16 10 doing that.

11 **A.** I had moved out of my dad's in late February.

12 **Q.** Of 2012?

13 **A.** Yes. So from about that time.

14 MR. HERDMAN: I have nothing else, Your Honor.
14:24:52 15 Thank you.

16 THE COURT: We will take a brief recess, about
17 ten minutes. You may give the defendant an opportunity to
18 go to the restroom.

19 (Thereupon, a recess was had.)

14:31:14 20 THE COURT: Do you have any more questions?

21 MR. PYLE: I have no redirect.

22 THE COURT: You may step down.

23 Does the defendant have any additional
24 testimony you wish to offer?

14:31:29 25 MR. PYLE: Thank you. No, Your Honor.

1 THE COURT: Does the government have any
2 rebuttal testimony that you wish to offer?

3 MR. HERDMAN: We do not, Your Honor, subject,
4 I think, to the extent that it was relevant at all, the fact
14:31:41 5 that Special Agent Stark is not 17 or 20. I think --

6 THE COURT: I don't think Mr. Stark has been
7 even identified.

8 Are you prepared to argue in support of your
9 motion?

14:31:57 10 MR. PYLE: I am, Your Honor.

11 THE COURT: Why don't you proceed.

12 MR. PYLE: Your Honor, setting aside the
13 question about the technical problems, and the government
14 assures me there are none, but setting aside that for a
14:32:15 15 moment, Your Honor, the question of voluntariness is a very
16 case-specific analysis. You know, we understand that on one
17 extreme, agents can't beat somebody. They can't have them
18 lay down naked for prolonged periods. We kind of know it
19 out there what they can't do, but, you know, as you get
14:32:40 20 closer and closer to the middle, the line becomes blurrier,
21 blurrier and blurrier.

22 In this case, you had, among other things, and
23 what I would say was an extreme governmental response at the
24 time of the arrest, which Brandon characterizes as being
14:33:02 25 traumatic, and you can understand why he would. I mean, so

1 many weapons, men, et cetera, laying on the ground, wet,
2 tired. He certainly gives that appearance of somebody who's
3 disoriented on the videotape.

4 There's no question the rights were given to
14:33:23 5 him on the page. There's a real question about whether he
6 legitimately understood that he had a right to say no, and
7 that goes to the core of the voluntariness issue. Whether
8 there's a combination of circumstances which were legally
9 sufficient for us to conclude that they overbore his will to
14:33:46 10 say, "I want a lawyer," or "I want to refrain from" --

11 THE COURT: Wait a minute. That's two
12 different things. Voluntariness and his Miranda rights are
13 two different things.

14 MR. PYLE: I understand.

14:33:57 15 THE COURT: So I thought you were going --
16 your argument is going to be that when you take all the
17 facts into consideration, all the background testimony, his
18 statement was not voluntary.

19 MR. PYLE: Judge, that's my argument. I just
14:34:17 20 would like to add one kind of novel -- what some people --

21 THE COURT: Well, sketch for me the facts that
22 you believe support a judicial decision that the statement
23 of the defendant was not voluntary.

24 MR. PYLE: Okay. The circumstances of his
14:34:36 25 arrest, being wet, being cold, being --

1 THE COURT: Let's start with circumstances of
2 his arrest.

3 MR. PYLE: Yes, sir.

4 THE COURT: Am I to ignore all the testimony I
14:34:47 5 heard earlier on the motion for detention? You know, am I
6 supposed to wipe my mind clear about what I heard during
7 that testimony about the apparent willingness of this
8 defendant and other defendants to blow up a bridge? Am I to
9 ignore that?

14:35:10 10 MR. PYLE: I think so.

11 THE COURT: Why? Why is that not part of the
12 background material? That goes to the arrest. You seem to
13 be arguing that the arrest is overly broad and inappropriate
14 and somehow that weighs on the voluntariness of the
14:35:29 15 defendant's subsequent statement. But it seems to me that
16 I'm allowed to take into consideration the earlier testimony
17 that I heard that stands unrebutted about the attempt of the
18 five defendants to blow up a bridge across a national park.
19 I heard that in the initial motion for detention.

14:35:56 20 Now, am I supposed to wipe that out of my mind
21 when I consider the nature of the arrest?

22 MR. PYLE: I would, at the very least, like
23 you to put it into context.

24 THE COURT: Okay. All right.

14:36:14 25 MR. PYLE: There's a broader context. I mean,

1 what led up to the events of the bridge, that was a
2 six-month evolution or lead-up.

3 THE COURT: That may well be, but does the
4 government not have the right to arrest them at the site?

14:36:29 5 MR. PYLE: They have a right. We're not
6 arguing it's an illegal arrest.

7 THE COURT: All right. But they've got to be
8 more kindly about it? They have to avoid any show of force
9 and shouldn't have weapons around when they arrest them?

14:36:44 10 MR. PYLE: Judge --

11 THE COURT: I'm trying to put it in context of
12 what you're -- what your client said at the beginning, and I
13 took from his initial ten minutes that he was real upset
14 that the government was prosecuting him. He seems to be
14:37:00 15 unable to connect the arrest with the prior conduct, as if
16 it's not -- it's somehow not relevant.

17 MR. PYLE: In my view, what I was attempting
18 to do through my questioning and what I think Brandon was
19 trying to do with his answers is to try to describe for the
14:37:20 20 court what was going through his head at the time he was --

21 THE COURT: It's going through his head that
22 somehow it's improper to arrest him because he hadn't really
23 engaged in criminal conduct. I gather that's what he's
24 trying to get across.

14:37:33 25 MR. PYLE: No. I'll do the talking here,

1 Brandon. But that's not the point at all, Your Honor.

2 We have --

3 THE COURT: What would you have the government
4 do in this context?

14:37:44 5 MR. PYLE: Well, you know, whether they used
6 50 officers or 5 officers, I can't nitpick, but I can say,
7 and I think a reasonable person or reasonable juris would
8 say that a person who's confronted with that kind of show of
9 force, when they're Mirandized, they are going to say, "Wait
14:38:03 10 a minute. They say I have a right, but do I?"

11 THE COURT: Okay.

12 MR. PYLE: And that's why I say the issue is
13 so very --

14 THE COURT: So what's the government supposed
14:38:15 15 to do, psychoanalyze the defendant when they advise him of
16 his rights?

17 MR. PYLE: Well, at the least, Your Honor, I
18 think an inquiry, a statement like "I know I have no rights"
19 requires, and I mean that, requires an interrogator to say,
14:38:34 20 "You do have rights. Here are your rights. You have the
21 right to exercise those rights." And the novel and unique
22 part of this motion is I am saying that they have the
23 additional obligation to say, "And if you exercise these
24 rights, your exercise cannot be used against you in a
14:38:52 25 criminal proceeding."

1 THE COURT: I have yet to hear anybody say
2 that. I know that's what you're talking about, but I don't
3 see any requirement in Miranda jurisprudence to advise the
4 defendant that were he to stand trial, the government is
14:39:07 5 going to say, "The fact that you remain silent at trial
6 cannot be considered."

7 MR. PYLE: That's the interesting part, Your
8 Honor. Because when Miranda was decided, we didn't have
9 that corresponding right, defendants did, to prevent the
14:39:26 10 government from arguing that their exercise of the right
11 could be considered by the jury.

12 That came later.

13 THE COURT: That's the Doyle case?

14 MR. PYLE: Yes.

14:39:36 15 THE COURT: All right.

16 MR. PYLE: Mr. Jim Willis would be happy to
17 tell you about it many times if you would like to hear it.

18 But that came later. So when Miranda was
19 decided, they incorporated what were then essentially the
14:39:50 20 Fifth and Sixth Amendment rights into these warnings. So
21 when Doyle was decided, in my view, what should have
22 happened and didn't happen, as before you now, is the
23 question about whether that right should be incorporated
24 into the Miranda warnings.

14:40:07 25 THE COURT: Okay. Let's go on as to why you

1 believe that the evidence viewed in the light -- I think the
2 burden of proof is upon you to establish the statement is
3 not voluntary. So in viewing the evidence in the light most
4 favorable to the defendant, what are the building blocks for
14:40:37 5 determination that the statement was involuntary? The
6 nature of the arrest?

7 MR. PYLE: Yes, the time of night, the wet,
8 the cold, the government's response to his statement or
9 question about not having rights.

14:40:53 10 And, further, Your Honor, and I think this is
11 just huge, is when he does raise a question about who's
12 going to appoint a lawyer, the response is, "The U.S.
13 Attorney's Office and the judge," I mean, neither of whom
14 are in the room, of course, but to hear that the
14:41:12 15 prosecutor's office is going to appoint the lawyer?

16 THE COURT: But that has to do with whether
17 he's waived his rights under Miranda. That, in my view,
18 doesn't -- is not a building block of the idea that the
19 statement is involuntary.

14:41:28 20 MR. PYLE: I may be mixing apples and oranges,
21 and I probably am.

22 THE COURT: Well, I appreciate the confusion.
23 I am just -- I want to be sure I understand the building
24 blocks that support, in your view, a judicial determination
14:41:46 25 that the statement was involuntary.

1 Do you have anything else you would like to
2 raise?

3 MR. PYLE: Just that what some may argue as a
4 detail, I do not, but him being held in the "cage," quote,
14:42:01 5 unquote. He wasn't being booked or he wasn't being
6 processed. He was just being held in a cage for what
7 everybody agrees was at least an hour, and that certainly --
8 certainly has an effect on a person, let's put it that way.
9 That's my argument.

14:42:19 10 Thank you, Judge.

11 THE COURT: Thank you. Counsel for the
12 government may respond.

13 MR. HERDMAN: Thank you, Your Honor.

14 Where would you like me to begin?

14:42:31 15 THE COURT: Well, let's focus on the Miranda
16 rights and whether you believe you established compliance
17 with Miranda.

18 MR. HERDMAN: Yes, Your Honor. In short, the
19 answer is absolutely. If this is a defendant -- you saw him
14:42:50 20 testify. He is absolutely intelligent enough, he's facile
21 enough, he understands what's going on, he's mentally acute,
22 he's mentally aware. This is not some sort of person who
23 had diminished capacity to understand what those rights are.

24 He completely understood. In fact, his
14:43:12 25 testimony was that he understood them, and the one he had

1 some questions on, he asked some follow-up questions.

2 And, Judge, from whether it's focused on this
3 case or if it's a larger case, that advisement of rights
4 form is the touchstone in terms of advising an individual of
14:43:30 5 what their rights are. There's no -- I will address the
6 Doyle argument in a moment, but there's no requirement that
7 the government go beyond what that advisement of rights form
8 is, and that's exactly what happened here.

9 The defendant said he had no rights. And to
14:43:48 10 correct that perception, to the extent that it was a
11 truthful perception, Agent Molina presented him with that
12 advisement of rights form which had them written out in
13 black and white on the form. The defendant has testified,
14 confirmed he read the form, he understood it, he signed it
14:44:03 15 and he agreed to participate in questioning.

16 And to focus on what I think the court is
17 going to ask about is with respect to this follow-up
18 question that the defendant asked. He says, "Cannot afford
19 an attorney," I don't want to misquote this because it is
14:44:22 20 very important.

21 He says, "Cannot afford a lawyer, where would
22 one be appointed from?"

23 And Agent Molina says, "Uh, the U.S.
24 Attorney's Office." He's explained why he said that, at
14:44:34 25 least in his mind why that was the first thing that came to

1 his mind.

2 And let me just say this for a moment, Your
3 Honor. It's very easy, I realize, to be in the confines of
4 this courtroom and go back through a recorded statement and
14:44:48 5 do precisely what counsel is asking this court to do, which
6 he's saying he's not asking the court to do, but he is
7 asking to court to nitpick this statement and to nitpick his
8 advisement of rights.

9 And what Agent Molina did was he made a
14:45:02 10 misstatement, which he's admitted to, and he corrected it by
11 saying, "The judge is who appoints the attorney," and
12 that's -- Your Honor, that's factually true. He didn't lie
13 to the defendant. He told him the truth. And the defendant
14 apparently accepted that. He nodded yes. He continued
14:45:18 15 reading the advisement of rights form.

16 And what Agent Molina has testified to is, in
17 fact, what does happen. If at some point a defendant
18 invokes an attorney, like happened in another one of his
19 codefendants, invoked an attorney, the interview ceased at
14:45:34 20 that exact moment. It stopped.

21 And this is so far removed from the case law
22 that discusses implication of an attorney. I'm not even
23 sure there's any authority addressing what Mr. Pyle would
24 have this court do, which is to suppress this statement
14:45:48 25 based on what he claims is a faulty Miranda advisement based

1 on a simple question, a simple truthful answer to a
2 defendant, and then the defendant agrees to be questioned.
3 And there's no discussion about, "Gee, maybe it would be
4 great to have an attorney. Where do I get an attorney?
14:46:05 5 When do I get this attorney?" He didn't even ask when.

6 So I just think that -- I think that this
7 argument is so far outside the heartland of Miranda cases
8 with respect to this attorney question and whether or not
9 someone can be appointed an attorney that I saw certainly no
14:46:26 10 persuasive law that was cited by counsel, and I would
11 venture to say that he can't find any, because this is -- if
12 this statement is considered, in light of all of the
13 prevailing law in Miranda, it quite simply cannot be
14 anything but a proper advisement of rights and, therefore,
14:46:44 15 the defendant's waiver was voluntary.

16 THE COURT: Let's go to the issue of
17 voluntariness.

18 MR. HERDMAN: Okay, Your Honor.

19 And this is a factual issue, and, you know,
14:46:51 20 I -- it's hard for me to pick a point to start here on this.
21 But I will start at the arrest of the defendant. And, Your
22 Honor, I am sorry to have to ask the questions to go to
23 earlier in the night, but I just want this court to remember
24 that this defendant is the one who put himself in the middle
14:47:13 25 of the night, in the pouring rain, at the base of a bridge

1 in a national park. He was there to set off explosives.

2 THE COURT: That's why I challenge Mr. Pyle
3 about whether I'm supposed to forget what I heard in the
4 detention. I don't think you were present for the detention
14:47:28 5 hearing.

6 MR. HERDMAN: I was not, but I'm aware of it.

7 THE COURT: It was very -- it's a 128-page
8 transcript, and I listened carefully to what the agent had
9 to say and I concluded that detention was appropriate. And
14:47:41 10 certainly, I heard evidence that certainly made a prima
11 facie case that all of the defendants, including this
12 defendant, were present at the time that the -- the apparent
13 explosives were set at the bridge and then they traveled on
14 to Applebee's where they were arrested after they believed
14:48:09 15 that they had a cell phone that would set off the bomb.

16 I don't think I can eliminate that from my
17 recollection.

18 MR. HERDMAN: Nor, Your Honor, do I think that
19 you should, because there was testimony from Agent Molina
14:48:20 20 that the affidavit itself formed the basis of his approach
21 to the interview with the defendant. And I'm happy to
22 proffer that as a separate exhibit for this motion. I know
23 it's a document on the court's docket.

24 THE COURT: I don't think that affidavit had
14:48:32 25 been filed at the time that he was questioned. The

1 questioning took place almost simultaneously with the
2 arrest. I don't think -- the affidavit wasn't filed until
3 after the arrest.

4 MR. HERDMAN: I believe it was filed prior to
14:48:48 5 the arrest. To the extent that's relevant, I could make a
6 record of that.

7 But the point is, Your Honor, that those facts
8 absolutely inform everything that's associated with the
9 arrest, but it's also associated with what's -- what is the
14:49:01 10 defendant's mental state.

11 And he's well aware of what he's done earlier
12 that night, and the fact that his -- is he cold and wet?
13 Yes, he is. But that's -- you know what? He did that to
14 himself in more ways than one.

14:49:14 15 And, you know, I did ask him questions. He
16 said he was cold and wet and he left his jacket in the SUV.
17 And to the extent that goes to his physical condition,
18 again, that's him putting himself in a particular position
19 where he's walking around wet, he's been walking around in
14:49:30 20 the pouring rain probably for longer than he was outside
21 that SUV.

22 So to the extent his condition is relevant at
23 all to the interview setting, I would say it only improved
24 once he got into that interview room. He was offered really
14:49:46 25 anything that he needed to make himself comfortable, and he

1 said he wanted some coffee and he said he had to go to the
2 bathroom.

3 I don't know what else these agents could have
4 done at that point in time. And that was not -- that wasn't
14:49:59 5 a reward for doing anything. It wasn't anything other than
6 making sure that he was comfortable, and, as Agent Molina
7 testified, that he was aware of what was about to happen,
8 and he was comfortable making a decision, which is exactly
9 all he was afforded. He was afforded an opportunity to see
14:50:11 10 whether or not he wanted to talk.

11 He was unhandcuffed in the room, Your Honor.

12 I'm sorry. Do you have a question?

13 THE COURT: Well, I don't think I heard any
14 testimony as to what he eventually said. Does he make an
14:50:28 15 incriminating oral statement?

16 MR. HERDMAN: He did, Your Honor. I did
17 solicit some testimony from Agent Molina. It was a summary,
18 but a summary of some of the specifics that the defendant
19 incriminated himself, as well as others.

14:50:41 20 THE COURT: All right.

21 MR. HERDMAN: There was some testimony about
22 the fact that the charge had been placed at the base of the
23 bridge. It was supposed to be detonated by a cell phone.
24 Those are the kind of things that he admitted to.

14:50:52 25 THE COURT: Thank you.

1 MR. HERDMAN: You're welcome.

2 I would submit to the court there's absolutely
3 zero evidence that this defendant was intoxicated, zero.
4 His recall of details from that night probably rivals that
14:51:03 5 of every agent who was on the scene, and you can understand
6 why that would be. He was the one getting arrested after
7 all.

8 But he remembers the type of machine guns that
9 agents were wearing. He remembers how many agents there
14:51:14 10 were. He remembers where everyone was sitting in the car,
11 with the exception of whether he was on the left side or the
12 right side of the car. He remembers who was sitting next to
13 him. He remembers everything about that arrest.

14 And I submit to you that means he wasn't drunk
14:51:26 15 from this one tallboy that he drank, and you can see that on
16 the video that I played for the court. He doesn't slur his
17 speech; he doesn't droop his head. Agent Molina testified
18 he didn't appear intoxicated. He didn't smell like alcohol.

19 So he's not intoxicated. He's made much more
14:51:43 20 comfortable in the interview setting, and this is all prior
21 to him ever being advised of his Miranda rights.

22 He is apparently not on drugs or any sort of
23 medication at the time of this interview, according to his
24 testimony. And, Your Honor, with respect to -- I never saw
14:52:01 25 this sleep deprivation brought up in the interview at all.

1 But Mr. Baxter never complained of being sleepy, never
2 complained of needing a nap or anything like that. In fact,
3 he says he doesn't even keep very close track of the number
4 of hours of sleep he gets.

14:52:20 5 So I would just say, with respect to his
6 testimony about whether or not he slept in the days leading
7 up to his arrest on the 30th, I don't think that that's
8 credible or reliable evidence. He said he doesn't remember
9 how many hours of sleep he gets each night.

14:52:37 10 I'm sorry, Your Honor.

11 Those are -- I think those are the highlights
12 with respect to voluntariness. I mean, I would like just
13 for a second to direct the court's attention back to the
14 law, the authority on this, which is that if you're going to
14:52:54 15 find this statement was involuntary, there has to be some
16 indicia of police coercion and there's none of that here.

17 Mr. Pyle cannot cite to a case that will be on
18 point where a statement that was taken under these
19 circumstances was found to be involuntary. The fact that it
14:53:10 20 took place in the middle of the night, again, that's on the
21 defendant. That's when they chose to commit their crime.

22 And, Your Honor, I have a case that I want to
23 submit to the court. I'm going to provide a copy to
24 Mr. Pyle, but I think that this case is, for all of these
14:53:24 25 defendants, about as on point as it gets. And for the

1 record, it's United States versus Stokes, 631 F.3d 802.
2 It's a Sixth Circuit case, decided and filed February of
3 2011.

4 May I hand that up, Your Honor?

14:53:41 5 THE COURT: Sure.

6 MR. HERDMAN: Your Honor, when you look at the
7 facts of Stokes, this is an individual who was arrested --
8 in the Stokes case, he was arrested, for lack of a better
9 term, at a flop house. I don't know what else to call it.
14:53:54 10 It's some sort of a transient hotel area, New York City. I
11 know they call them flop houses.

12 He's arrested there on suspicion of
13 participating in an armed robbery, and that's late at night
14 that he's arrested. He's taken to the police station where
14:54:13 15 he's interviewed for approximately five hours, until 5:00 in
16 the morning, at which point in time, the interviewing ceases
17 because the defendant doesn't appear to be responsive
18 anymore. And all of those circumstances were found to be
19 perfectly a -- perfectly lawful, and the defendant's
14:54:37 20 confession was held to be voluntary.

21 And that's what we have here across this case,
22 Your Honor. I think the relevant portion starts at page
23 809, which would be page 9 of 10 in the handout there.

24 And so, Your Honor, I guess just to bring this
14:54:58 25 back to the point here is that there is no evidence at all

1 that this defendant's will was ever overborne by these
2 officers. You heard them talk to him. They were very
3 polite. They were very respectful. There was never a voice
4 raised. There was never a yell. There was never a threat.
14:55:17 5 And the defendant, he acknowledged that and wanted to talk
6 to these officers.

7 And it wasn't because they were threatening
8 him or that he was scared or intimidated. I can't put Agent
9 Stark's face on the record, short of taking a photograph of
14:55:31 10 him, but I think the record should reflect that he looks
11 very young and he is not an agent that you would roll out if
12 you wanted to scare somebody into making a statement.

13 I submit that the same principle applies to
14 Agent Molina. He's a soft-spoken, straight-talking agent
14:55:48 15 who came up on the stand and explained everything that
16 happened that night to court and counsel.

17 I don't know if there was something specific,
18 Your Honor, that you wanted me to address in terms of facts.

19 THE COURT: Anything further?

14:56:11 20 MR. HERDMAN: I would like to be heard briefly
21 on this defense counsel's proposal to expand the Miranda
22 warnings to include a Doyle v Ohio advisement.

23 THE COURT: You can talk about it if you want
24 to, but I'm not taking it into consideration.

14:56:28 25 MR. HERDMAN: Then I will just leave it as the

1 fact that I don't think it's certainly retroactively
2 appropriate to apply an additional requirement on these
3 officers, these agents, in terms of advising the defendant
4 of his rights.

14:56:48 5 I have nothing further.

6 THE COURT: Any rebuttal?

7 MR. PYLE: Your Honor, at the very least, the
8 discussion by the agent before questions were asked about
9 what Brandon is charged with and the fact that they will
14:57:08 10 relay what he says to the prosecutor, in my view,
11 constitutes a baseline of coercion there.

12 I mean, there's a suggestion that if you
13 don't, then -- you know, if you don't make this statement,
14 we're going to take that to the prosecutor and that's going
14:57:23 15 to be taken into account as well.

16 Yeah, I seen Stokes. I read this now. I've
17 read other cases like it. But every case is very unique and
18 that combination of circumstances is what's key here.

19 And I believe we've got a combination of
14:57:38 20 factors here that would cause reasonable people to say that
21 the government failed to meet their burden on voluntary --
22 that we have met our burden, however you want to think about
23 it, by a preponderance of the evidence on the voluntariness
24 issue. Thank you.

14:57:52 25 THE COURT: Thank you. I am going to address

1 the Miranda warning first.

2 One can make the argument that when the
3 authorities undertake to interrogate a suspect, while that
4 suspect is in custody, the very first words out of their
14:58:22 5 mouths ought to be the Miranda warning. That didn't happen
6 here, to the contrary.

7 But the court is of the view that the fact
8 that the Miranda warning was not given initially does not
9 equate with the determination that there was a failure to
14:58:45 10 provide an adequate Miranda warning, and the court finds
11 that the defendant's execution of the Miranda warning waiver
12 certainly put him on notice as to what his rights were, and
13 he also signed the consent form.

14 And so based on the execution of the advice of
14:59:13 15 rights, notwithstanding the fact that he wasn't advised
16 initially of his Miranda rights, the court finds that there
17 was substantial compliance with the mandate of the Miranda
18 decision and, therefore, the court will not suppress the
19 subsequent statements of the defendant, because I believe
14:59:39 20 there was no Miranda violation.

21 The issue of voluntariness, it appears to me
22 that the defendant has the burden of establishing that its
23 statement was involuntary. Possibly it's -- the government
24 has the burden to prove it was voluntary. But no matter
15:00:02 25 which way you cite the burden, it's my view that taking the

1 totality of the circumstances into consideration, the court
2 finds that the statement of the defendant was not
3 involuntary.

4 I was concerned about the fact that during the
15:00:29 5 interview of the defendant, there was some statement made to
6 the effect of "We'll be glad to take this information to the
7 prosecuting attorney," and one could imply from that that
8 the defendant was led to believe that he -- if he
9 cooperated, it would be to his benefit, but the defendant
15:00:46 10 did not offer any such testimony.

11 And so in my view, the fact that those
12 statements were made during the interview do not render the
13 subsequent statement involuntary.

14 I also watched with care the video of the
15:01:03 15 defendant, and there's no question that he was wet and he
16 was cold at the time he was interviewed, but by the same
17 token, I think the agents had a legitimate concern about the
18 possibility that there might be other mischief afoot and
19 that it was important to interview this defendant even if
15:01:25 20 the interview started at the midnight hour. And as a
21 consequence, the court finds that the timing of the
22 interview did not violate his constitutional rights with
23 respect to voluntariness.

24 And as a consequence, the court finds that the
15:01:49 25 statement of the defendant that he gave on the night of the

1 interview was voluntary and does -- the motion to dismiss is
2 denied in its entirety.

3 The court will put a brief order on. And if
4 counsel wishes to have a record of the court's ruling, you
15:02:06 5 can ask the court reporter for that ruling.

6 Is there anything further to come before the
7 court today?

8 MR. HERDMAN: Not from the United States, Your
9 Honor.

15:02:15 10 THE COURT: Mr. Pyle?

11 MR. PYLE: A couple housekeeping things, Your
12 Honor.

13 THE COURT: Sure.

14 MR. PYLE: One is that I will be meeting with
15:02:23 15 whomever from the U.S. Attorney's Office can show me an -- a
16 clean copy of the video that they intend to put in. In
17 failing that, of course, I renew my objection on technical
18 grounds.

19 THE COURT: Well, I would ask the government,
15:02:42 20 do you have any intention of putting -- I know it was the
21 earlier hearing today, you had no intention of putting --
22 placing the post-arrest statement of that defendant in your
23 case in chief, but do you have a different approach with
24 this defendant?

15:02:58 25 MR. HERDMAN: We do, Your Honor. Again, this

1 kind of refers back to where we were at yesterday. Our
2 intention is to, certainly by the 17th, but I would actually
3 do that earlier, provide counsel and the court with our
4 proposed -- what we would introduce from each defendant's
15:03:17 5 statement in our case in chief, if that makes sense, the
6 portions of those statements that we would seek to
7 introduce.

8 THE COURT: I thought you said you weren't
9 going to introduce the previous defendant's?

15:03:25 10 MR. HERDMAN: With the exception of
11 Mr. Stafford.

12 THE COURT: The other three you are?

13 MR. HERDMAN: Possibly, Your Honor. Again, I
14 would say --

15:03:34 15 THE COURT: Don't you have a date to provide
16 me with transcripts?

17 MR. HERDMAN: We do. By the 17th, Your Honor
18 we're supposed to provide court and counsel with not only
19 transcripts, but also portions of the transcript that we are
15:03:48 20 going to play.

21 THE COURT: Very well.

22 MR. HERDMAN: Those would include -- I would
23 say our interpretation, that includes whatever the
24 defendants have said in their video-recorded statements. I
15:03:58 25 think we certainly have identified a need to address that

1 with the court probably as soon as possible.

2 So to the extent, I have to say, I think
3 Mr. Baxter's statement is of a nature that of the defendants
4 whose statements we would still seek to introduce, I would
15:04:14 5 put him at the top of the list. I think his statements are
6 such that we would probably be most interested in admitting
7 it.

8 But with that said, Your Honor, to Mr. Pyle's
9 point, I -- we plan to provide him with an additional copy
15:04:30 10 and I will personally ensure that that copy works.

11 THE COURT: The copy I had this morning did
12 not include any incriminating statements. That was the --
13 well, there was some incriminating statements, yeah.

14 MR. HERDMAN: That's the -- Government's
15:04:50 15 Exhibit 3, Government's Motion Exhibit 3. Yes, that's true.
16 To that point, as I said, I think Mr. Baxter's statement is
17 one which we would probably be most likely to seek to
18 introduce some portion, subject to whatever the prevailing
19 Bruton law is in light of the traffic offense here.

15:05:21 20 THE COURT: Is there more in the way of
21 admissions beyond what's in this 11 pages?

22 MR. HERDMAN: It's a 90-page transcript,
23 thereabouts. The entirety of the transcript is about 90
24 pages.

15:05:36 25 THE COURT: You've got that on video?

1 MR. HERDMAN: Yes.

2 THE COURT: You intend on playing that for the
3 jury?

4 MR. HERDMAN: Not the entirety of the 90
15:05:43 5 minutes, no. That I can promise the court right now.

6 THE COURT: Well, I don't have an answer to
7 that question at the moment, but the general proposition of
8 law is that an admission against interest by a defendant is
9 admissible as an exception to the hearsay rule, whereas a
15:06:10 10 statement by a defendant that exonerates or not -- that is
11 exculpatory is not admissible is the exception to the
12 hearsay rule.

13 Now, the difficulty I've encountered in
14 reading the transcript of the defendant we were talking
15:06:33 15 about yesterday is the statement goes on for four hours and
16 there's a great mixture of inculpatory and exculpatory
17 statements throughout that statement. What you intend to
18 play, apparently, of this defendant is inculpatory and not
19 exculpatory?

15:06:54 20 MR. HERDMAN: Yes, Your Honor, that would
21 certainly be our intention.

22 THE COURT: Now, do they blend together?

23 MR. HERDMAN: To the extent that they would, I
24 think there would be a couple of evidentiary legs we would
15:07:04 25 seek to stand on. One of the most obvious, obviously the

1 rule of completeness. That is, if there's something that
2 informs what's said in the inculpatory portion, we should be
3 entitled to put that in.

4 THE COURT: Well, I see it as a problem.

15:07:20 5 That's what I'm trying to bring to Mr. Pyle's attention, is
6 that this intermingling of inculpatory and exculpatory
7 statements in the same document, it gets very difficult to
8 sort out as to what is admissible and what is not
9 admissible.

15:07:34 10 I am doing some research on that now, but
11 anything you can do to help me on that issue, I would
12 certainly appreciate it.

13 Do you follow what I am talking about?

14 MR. PYLE: I do. One -- one of the rule of
15:07:47 15 evidence -- I think it's Rule 106 -- isn't the rule of
16 completeness?

17 THE COURT: That's what I am concerned about,
18 is a rule of completeness, how do you interpret that against
19 that inculpatory statements are admissible and exculpatory
15:08:04 20 statements not admissible? So the issue of completeness is
21 involved.

22 And in that determination, and I don't have
23 any final view as to how that should be handled, but I see
24 it as a potential problem, and counsel may wish to deal with
15:08:23 25 it, and if you could agree to it on a particular submission,

1 I would be more than delighted.

2 MR. HERDMAN: That would certainly be our
3 preference, Your Honor. That's part of the reason we want
4 to preview these with defense counsel. And to the extent
15:08:37 5 they have an objection like that, we can hopefully deal with
6 it outside of having to come here.

7 THE COURT: We're getting closer and closer to
8 the trial date. Was it the 17th of September? I think I
9 continued it one day because of the Jewish holiday.

15:08:50 10 Okay. When is our next status conference?

11 MR. PYLE: I don't think we have one, Judge.

12 MR. HERDMAN: I want to see -- after these
13 hearings were set, that was our next status conference.

14 THE COURT: And I have a date where I wanted
15:09:26 15 potential voir dire questions submitted.

16 MR. HERDMAN: You did, and that is the 4th,
17 Your Honor.

18 MR. PYLE: I have a vivid recollection of the
19 last time we were in court, you said we're going to cancel
15:09:47 20 that status conference.

21 THE COURT: All right. If anybody believes --
22 if I get a request for a status conference, I'm going to
23 schedule it, from anybody.

24 The other thing I want to be sure that you're
15:10:00 25 familiar with, and I am sure you are, Mr. Pyle, that you

1 have to make sure that your client has appropriate dress
2 clothing for the trial. And I don't want him here in that
3 jumpsuit. And maybe the family could assist you in getting
4 clothing, and you have to get the clothing to the marshal's
15:10:19 5 office, because they will -- I know what they're going to
6 do. They're going to bring him in his jumpsuit and have him
7 change clothes in the marshal's office when he's due to
8 appear. And I want to be sure that's taken care of.

9 MR. PYLE: Judge, I am sorry that I have to
15:10:38 10 admit that I have a closet full of clothes that other
11 clients have left when they were taken out the wrong door,
12 so --

13 THE COURT: Is there anything else I can
14 address right now?

15:10:47 15 MR. PYLE: I would like to kind of preview a
16 couple issues that are on the horizon.

17 THE COURT: Sure.

18 MR. PYLE: The 17th is that date for the
19 government to disclose the transcripts they're going to use.
15:11:01 20 We will, of course, look at them. We're going to work with
21 them.

22 We have an expert audio guy trying to sort
23 things out as best we can, but I think there's going to be
24 some disputes, not only on the rule of completeness, but on
15:11:16 25 some technical issue, too. And we will, of course, be

1 breaking down your door to set a date if that comes to be,
2 Your Honor.

3 The other thing is, I think Mr. Gilbert took
4 it up with you, but I want to make it abundantly clear on
15:11:29 5 the record that I am giving notice on behalf of Mr. Baxter
6 that we intend to cross-examine -- I will call him AZ -- on
7 convictions that occurred beyond the ten-year period.
8 And --

9 THE COURT: I don't think that's been briefed
15:11:46 10 yet, as I understand it?

11 MR. PYLE: Step one is to give notice.

12 THE COURT: Are you going to file a motion in
13 limine to exclude that questioning?

14 MR. GETZ: Yes, Your Honor.

15:11:58 15 THE COURT: Well, if you could elaborate what
16 those convictions are and what the case law that you think
17 supports limiting cross-examination of those convictions
18 that are less than ten years old, I would appreciate that.

19 I don't know if I've had that issue -- it's
15:12:15 20 been a long time since I've seen that issue.

21 MR. PYLE: And in speaking for myself, I would
22 like some time to respond to their motion in limine.

23 MR. HERDMAN: Your Honor, one issue Mr. Pyle
24 brought up at a break, that apparently the defense has
15:12:34 25 retained a bomb expert, and we have not received a formal

1 notice that they have such an expert. I know he told me
2 about it. We don't know who that person is and what the
3 substance of the testimony would be, and I think it's very
4 likely that the government would be making a motion to
15:12:49 5 preclude that evidence, because I can imagine why they'll
6 want to introduce it and what they were going to introduce.

7 I think we have a pretty good argument that
8 it's not going to be relevant, and I am just alerting the
9 court, we've not received formal notice of any of this, and
15:13:06 10 I do think that we're entitled to it at some point
11 relatively soon so we could make a motion to preclude it if
12 we need to.

13 MR. PYLE: We went over this at the last
14 hearing, that we haven't been provided with -- and there's
15:13:17 15 been E-mails. I don't know if you've been noticed on. But
16 there's been E-mails asking for a view of the evidence,
17 which is the predicate for our expert to write an expert
18 opinion.

19 We're trying to set that up either for
15:13:29 20 Wednesday or Thursday. But we gave everybody notice that --

21 THE COURT: What do you anticipate your expert
22 is going to opine?

23 MR. PYLE: That this amount of C-4, even if it
24 was real, wouldn't bring down any of that deck on the
15:13:47 25 bridge.

1 MR. HERDMAN: That's what I suspect he's going
2 to say, Your Honor. I think our position will be that
3 that's not relevant, although I haven't seen a report yet.

4 THE COURT: What's the relevance?

15:13:59 5 MR. PYLE: Well, the relevance is, and the
6 court may view it as a subtle issue, but we don't. The
7 government's been, in their press releases and everything
8 else, they were going to blow up this bridge, they were
9 going to kill people. This amount of C-4 would just cause a
10 dent at the base of the bridge. It wouldn't put anybody's
11 life in danger.

12 THE COURT: Do you intend to introduce any
13 expert about the explosive force of what apparently was
14 placed at the bridge?

15:14:36 15 MR. HERDMAN: Certainly if defense counsel
16 seeks to, I think we would have to, Your Honor. But I think
17 at the outset, my instinct is that -- again, this is -- I'm
18 not trying to lock us into this position because I haven't
19 seen the report, but these are inchoate offenses. They're
15:14:54 20 an attempt at a conspiracy. And that type of evidence is
21 precisely what would not be relevant to the charges in this
22 case.

23 THE COURT: Mr. Pyle, if there was an
24 indictment charging two or more persons with a conspiracy to
15:15:21 25 rob a bank on a given day, and there was proof that that was

1 the nature of the conspiracy, would it be relevant to show
2 that the bank wasn't open on that day?

3 It seems to me what you're trying to show is,
4 well, the explosive wasn't going to work, and your claim
15:15:48 5 that's relevant on what subject?

6 MR. PYLE: Judge, no. Our argument is, and
7 it's a rebuttal argument to the government's claim that the
8 intention was to do harm to people. And this amount of C-4
9 would not have caused anybody on that bridge to be harmed
15:16:12 10 whatsoever. It's more of a -- more in the nature of a prank
11 than it is an intent to cause anybody damage or harm.

12 THE COURT: Because they were ignorant as to
13 what the explosive force was?

14 MR. PYLE: Well, they kind of understood what
15:16:31 15 it was, and certainly an expert is --

16 THE COURT: That's back to my -- if they -- if
17 the evidence is they believed it was going to bring down the
18 bridge, is the fact that it was insufficient to bring down
19 the bridge, is that relevant?

15:16:51 20 MR. PYLE: Well, there is going to be
21 testimony that they did not believe that it was going to
22 bring down the bridge.

23 THE COURT: In the government's case in chief?

24 MR. PYLE: Through cross-examination, yes,
15:17:03 25 through their own statements. I mean, this mixed bag about

1 the tapes they're going to play with the CHS, the jurors are
2 going to hear about this.

3 But overriding all this, Judge, is what the
4 government has been doing consistently, and that is, is
15:17:19 5 putting out a theme here that they -- these guys were
6 intending or conspiring to blow up the bridge. Well, this
7 little bit of C-4 is not going to blow up anything.

8 MR. GETZ: Your Honor, Mr. Pyle keeps making
9 those statements regarding what the government is putting
15:17:37 10 out, and I guess at some point, we've got to challenge him
11 to point out where it is the government has been saying or
12 putting that information out. It certainly hasn't been in
13 this courtroom. And I would challenge Mr. Pyle to point to
14 any interactions with the press or the media that the
15:17:55 15 government has had since this case was charged.

16 He's talking about putting an expert on in
17 rebuttal to evidence that the government has not put on yet.
18 As indicated, we have already stated it does not appear
19 likely there to be any evidence like that that would be
15:18:13 20 relevant to the charges in this case. And so the
21 anticipation of rebutting something that the government has
22 no intention of putting on, I would say, again, I question
23 the relevance of having that.

24 THE COURT: Well, would you view this as a
15:18:28 25 Daubert hearing? I have those in civil cases, where the

1 claim is that the expert is not capable or appropriate or
2 well trained to give the expert opinion he proposes to
3 offer. We call that the Daubert hearing, D-A-U-B-E-R-T
4 hearing. I've never had a Daubert hearing in a criminal
15:18:54 5 case, but it sounds to me at least like it's a kissing
6 cousin of a Daubert.

7 Do you intend to raise it in a motion in
8 limine?

9 MR. HERDMAN: I think so. I have had to deal
15:19:04 10 with Daubert issues in criminal cases, so it really depends
11 on what the expert is, who the expert is, what his opinion
12 is and what the basis of that opinion is. We don't have
13 that.

14 THE COURT: When is the expert required to
15:19:17 15 give notice of the opinion? Isn't that covered in the
16 rules?

17 MR. HERDMAN: Yeah. By the rules, it's 30
18 days before trial. I think there may be a court order to
19 this effect. I think it might be the 17th. For some reason
15:19:37 20 I want to say it's the 17th. I know there's some other
21 things that are due on the 17th.

22 THE COURT: Why don't you file a motion
23 suggesting a proposed order with respect to a defense
24 expert, because I gather you do not intend to offer an
15:19:51 25 expert?

1 MR. HERDMAN: Like I said, Your Honor, that's
2 all contingent on what this proffered testimony is, and
3 what, if any, testimony we would have to rebut it or
4 challenge it. I just don't know. I'm in a vacuum right now
15:20:07 5 not knowing any more.

6 THE COURT: Why don't you give me a proposed
7 order with respect to that.

8 Is there anything more, Mr. Pyle?

9 MR. PYLE: I just want to make it abundantly
15:20:18 10 clear that we've been on the record with this court saying
11 we haven't gotten discovery. We haven't seen a single
12 stitch of physical evidence.

13 THE COURT: You haven't seen what?

14 MR. PYLE: We haven't seen any physical
15:20:30 15 evidence whatsoever, and we've asked for it before.

16 THE COURT: What physical evidence do you have
17 other than the --

18 MR. HERDMAN: My understanding is not much.

19 THE COURT: There's a video, isn't there --
15:20:42 20 that I thought I watched during the detention hearing?

21 MR. HERDMAN: Right.

22 THE COURT: And have you seen that video?

23 MR. PYLE: We've seen that significantly. We
24 haven't seen the fake C-4. We haven't seen what's referred
15:20:55 25 to in some of the reports.

1 THE COURT: All right. Let me stop. Was the
2 so-called fake C-4 seized by the government?

3 MR. HERDMAN: Yes, Your Honor.

4 THE COURT: Have you displayed that to him?

15:21:04 5 MR. HERDMAN: No, Your Honor. That's what we
6 were trying to schedule for this week so they could come see
7 it.

8 THE COURT: Is there any other physical
9 evidence?

15:21:09 10 MR. HERDMAN: I was talking to the agent about
11 that. If so, it is very limited. It is not -- this isn't a
12 case where there was a search warrant executed and there
13 were reams of documents and all sorts of seized property.
14 It's just not that kind of a case.

15:21:25 15 THE COURT: Well, will you be able to have the
16 evidence disclosure, say, by -- is this a Tuesday?

17 MR. HERDMAN: Today is Tuesday, Your Honor.

18 THE COURT: A week from today, can you have
19 it?

15:21:39 20 MR. HERDMAN: We can. At this point, it's
21 subject to whatever scheduling for defense counsel is.

22 Your Honor, I will credit Mr. Pyle. I know
23 that there's been discussions about this expert. We've
24 just -- that's not good enough. We need a formal notice.

15:21:54 25 So, yes, I know that there's been discussion about this. I

1 don't mean to make it sound otherwise. But we don't have a
2 formal expert notice, and I don't know if you need --

3 THE COURT: It's been a while since I've
4 looked at the criminal rule. What do the criminal rules
15:22:08 5 require in terms of disclosure of experts?

6 MR. HERDMAN: I thought it was 30 days. But
7 in my request to the court that we will file, I will lay
8 that out, what the rule is.

9 MR. PYLE: Further, the date for disclosure of
15:22:32 10 the Giglio/Brady material is set for September 3. And in
11 our view, there should be a substantial amount of
12 information disclosed there, including -- you know,
13 including documents.

14 So since that date has been set, and the
15:22:48 15 government proposed Giglio materials, any rule saying that
16 it's got to be 30 days, 30 days before trial, certainly
17 that's inconsistent with the government's position and the
18 court's order.

19 THE COURT: Let's come up here and see what
15:23:07 20 the rules say about expert disclosure.

21 MR. PYLE: It's 26 something.

22 THE COURT: It's not Rule 12?

23 MR. PYLE: It's either 16 or possibly a 26.

24 THE COURT: Well, 16-Z talks about expert
15:26:10 25 witnesses from the government's standpoint, and then

1 16(b)(C) has the defendant, at the government's request,
2 give to the government a written summary of any testimony
3 that the defendant intends to use, blah, blah, blah. It
4 doesn't -- I don't see any date. I don't see any time.

15:26:55

5 MR. HERDMAN: For some reason the 30 days
6 jumps out at me.

7 THE COURT: I don't think there's a rule.

8 Court will be in recess. Thank you.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Lori A. Callahan
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